Supreme Court, U.S.
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No. 99-___

In The

Supreme Court of the United States

YUKON RECOVERY, L.L.C.,

Petitioner,

v.

OCEAN MAR, INC.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Where evidence of subrogation is doubtful and insurers failed to undertake timely salvage efforts, should abandonment of historic ship cargoes be inferred, consistent with Congress' manifest intent in the Abandoned Shipwreck Act (ASA), 43 U.S.C. §§ 2101-06, to convey title over such wrecks to the States?

LIST OF PARTIES BELOW

The parties to this case below are as reflected in its caption.

In the District Court, this matter was a consolidated action in which Yukon Recovery L.L.C. brought an *in rem* admiralty action against Certain Abandoned Property, and Ocean Mar, Inc. brought an action styled against the cargo of the SS ISLANDER. The *in rem* defendants below were not otherwise represented.

RULE 29.6 LIST

Yukon Recovery, L.L.C. has no parent companies or subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Yukon Recovery L.L.C., respectfully prays that a writ of certiorari issue to review the March 7, 2000, judgment and opinion of the United States Court of Appeals for the Ninth Circuit in the above-captioned proceeding.

OPINIONS BELOW

The opinion and judgment of the U.S. Court of Appeals for the Ninth Circuit of March 7, 2000, *Yukon Recovery, L.L.C. v. Certain Abandoned Property*, No. 98-36015 (9th Cir. March 7, 2000), is reported at 205 F.3d 1189 (9th Cir. 2000) and is reprinted at App. 1a.

The judgment and order of the U.S. District Court for the District of Alaska, Chief Judge Holland, presiding, of August 28, 1998, was unreported, other than at 1998 A.M.C. ["American Maritime Cases"] 2884 (D. Alaska 1998) and 1998 WL 965985 (D. Alaska). It is reprinted at App. 15a.

STATEMENT OF JURISDICTION

Petitioner seeks review from the opinion and judgment of the U.S. Court of Appeals for the Ninth Circuit of March 7, 2000. The Supreme Court has jurisdiction to review cases from the Courts of Appeals under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

This Petition implicates the power of the federal courts to make substantive maritime law, pursuant to the Constitution's grant of jurisdiction in Article III, section 2 ("The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction.").

More immediately, this Petition involves construction of the Abandoned Shipwreck Act (ASA) of 1987, 43 U.S.C. §§ 2101-2106, reprinted in its entirety at App. 31a. The crucial provisions of the ASA include its notional definition of abandonment at section 2101(b), extending the coverage of the Act to "certain abandoned shipwrecks, which have been deserted and to which the owner has relinquished ownership rights with no retention." In addition, 43 U.S.C. §§ 2105(a) & (c) transfer to the States ownership of "abandoned shipwrecks" which satisfy other criterion.

STATEMENT

This Petition raises the question left open by this Court's decision in *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998) — the standard of abandonment for vessels sunk in State waters and otherwise covered by the 1987 Abandoned Shipwreck Act.

1. a. In 1987, Congress legislated the Abandoned Shipwreck Act (ASA), codified at 43 U.S.C. §§ 2101-2106;

App. 31a. The ASA gave States title to shipwrecks that are (1) abandoned, and (2) are (a) embedded in the submerged lands of a State or (b) declared eligible for listing on the National Registry of Historic Places. See 43 U.S.C. §§ 2105(a) & (c); App. 34a-35a. The manifest purpose of the ASA was to grant to the States title and management authority over historic shipwreck resources. See 43 U.S.C. § 2101(a); App. 31a.

Although the ASA does not formally define "abandonment," it recognizes that abandonment can be inferred for "certain abandoned shipwrecks, which have been deserted and to which the owner has relinquished ownership rights with no retention." 43 U.S.C. § 2101(b); App. 31a. In the legislative history of the ASA, Congress observed that "the term 'abandoned' does not require the original owner to actively disclaim title or ownership. The abandonment or relinquishment of ownership may be implied or otherwise inferred, as by an owner never asserting any control over or otherwise indicating his claim of possession of the shipwreck." *Abandoned Shipwreck Act of 1987*, House Report No. 100-514(I), at 2, reprinted in 1988 U.S.C.C.A.N. at 366. Moreover, Congress noted that

> Abandoned shipwrecks within the scope of this Act include those which have been deserted and to which the owner has relinquished all ownership rights. . . . the act of abandonment may be implied or inferred from the circumstances of the shipwreck as when an owner has never asserted any control over or otherwise indicated a claim of possession.

House Report No. 100-514(II), at 5, reprinted in 1988 U.S.C.C.A.N. at 373-74.

b. Since its enactment, recurring doubts have been raised by courts as to the proper standard of abandonment to be applied to vessels and cargoes ostensibly covered by the ASA. Whether a vessel is abandoned is crucial to the application of the ASA. That finding determines title over the wreck (and its contents), as well as the application of State regulatory authority to protect valuable underwater cultural heritage. If a shipwreck is found *not* to be abandoned for purposes of the ASA, ownership rests in the original owner or a subsequent finder, and effective management of the wreck-site is vested in a salvor-in-possession. The standard of abandonment for shipwrecks, as well as the practical burdens of proof in satisfaction of that standard, has thus become the fighting issue in all litigation involving historic shipwrecks situated on State submerged lands.[1]

[1] Nearly a dozen decisions have involved a substantial question of the standard of abandonment under the ASA. These include: *Deep Sea Research, Inc. v. The Brother Jonathan*, 883 F. Supp. 1343 (N.D. Cal. 1995), aff'd, 102 F.3d 379 (9th Cir. 1996), aff'd in part, vacated in part on other grounds, and remanded, 523 U.S. 491 (1998); *Fairport International Exploration, Inc v. The Captain Lawrence*, 105 F.3d 1078 (6th Cir. 1997), vacated and remanded on other grounds, 523 U.S. 1091 (1998), on remand, 177 F.3d 491 (6th Cir. 1999), on remand, 72 F. Supp.2d 795 (W.D. Mich. 1999); *Sea Hunt, Inc. v. Unidentified, Shipwrecked Vessel or Vessels*, 47 F. Supp.2d 678 (E.D. Va. 1999); *The People ex rel. Illinois Historic Preservation Agency v. Zych*, 687 N.E.2d 141 (Ill. App. 1997), rev'd, 710 N.E.2d 820 (Ill. 1999); *Commonwealth v. Marine Underwater Surveys, Inc.*, 531 N.E.2d 549 (Mass. 1988).

This list does not include (1) cases decided before the enactment

(continued...)

c. In its 1998 opinion in *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998), this Court had the opportunity to address the ASA's standard of abandonment. The unanimous Court, O'Connor, J., writing, characterized the issue in these terms:

> As to the specifics of the State's claim under the ASA, the [Court of Appeals] held that the District Court did not err in concluding that the State failed to prove that the Brother Jonathan is abandoned within the meaning of the statute. The court reasoned that, in the absence of a definition of abandonment in the ASA, "Congress presumably intended that courts apply the definition of abandonment that has evolved under maritime law." [102 F.3d at 387.] In maritime law, the court explained, abandonment occurs either when title to a vessel has been affirmatively renounced or when circumstances give rise to an inference of abandonment. Here, the Court of Appeals concluded, the District Court's "failure to infer abandonment from the evidence presented by

[1](...continued)
of the ASA but which involved proof of abandonment, see, e.g., *Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified Wreck*, 833 F.2d 1059 (1st Cir. 1987); nor (2) decisions involving vessels sunk beyond State waters (and thus beyond the ASA's ambit) where the standard of abandonment was material in a dispute between a finder and an original owner (or its insurer). See, e.g., *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 974 F.2d 450 (4th Cir. 1992), cert. denied, 507 U.S. 1000 (1993), subsequent proceeding, 203 F.3d 291 (4th Cir. 2000).

> the State was not clearly erroneous," given the insurance companies' claims to the ship's insured cargo and undisputed evidence presented by DSR that the technology required to salvage the Brother Jonathan has been developed only recently. Id., at 388.

523 U.S. at 499. The appropriate standard of abandonment under the ASA was fully briefed by the parties in *Deep Sea Research*, and a position was even staked-out by the United States as *amicus curiae*. See 1997 WL 473386, at *39-46.

Nevertheless, in *Deep Sea Research*, this Court chose not to fully confront the question of the ASA's standard of abandonment, preferring to confine its decision largely to rejecting California's assertion of Eleventh Amendment immunity in an *in rem* admiralty action where it was not in actual possession of the *res*. See 523 U.S. at 507-08. The Court did, however, make this important observation:

> Because the record before this Court is limited to the preliminary issues before the District Court, we decline to resolve whether the Brother Jonathan is abandoned within the meaning of the ASA. We leave that issue for reconsideration on remand, with the clarification that the meaning of "abandoned" under the ASA conforms with its meaning under admiralty law.

Id. at 508. So aside from confirming that the ASA's standard of abandonment is governed by the federal general maritime

law, this Court reserved decision on the precise contours of that standard. This Petition raises that question.

2. a. This case features two rival salvors for the wreck of the SS ISLANDER, a Yukon Gold Rush-era vessel sunk off the coast of Alaska in 1901. How the SS ISLANDER came to grief in the Lynn Canal, south of Juneau, Alaska, on August 15, 1901, has been sketched by the District Court, see App. 19a, and need not be recounted here for purposes of this Petition. As was observed by the Court of Appeals, App. 2a, most of the relevant facts of this case are undisputed. The SS ISLANDER lies within Alaska's State waters and is thus covered under the 1987 Abandoned Shipwreck Act. See App. 10a-12a; see also 43 U.S.C. §§ 2105 (a) & (c), App. 35a-36a.

The only matter in dispute is whether gold carried as cargo on-board the SS ISLANDER was abandoned by its original owner, the Canadian Bank of Commerce (CBC), and its insurer, the Marine Insurance Company (MIC). If the cargo was not abandoned by CBC and MIC, Ocean Mar becomes the appropriate salvor-in-possession by virtue of its salvage contract with MIC. If the cargo *was* abandoned, the State of Alaska is the owner, pursuant to the ASA, and Yukon Recovery may occupy a superior position to Ocean Mar, Inc., as being the first salvor to file an *in rem* admiralty arrest on The ISLANDER wreck-site.[2]

[2] This Petition would not require the Court to determine whether Yukon or Ocean Mar is the rightful salvor-in-possession of The SS ISLANDER. Both the District Court and Ninth Circuit clearly premised their decisions on a ruling that Ocean Mar had acquired a valid salvage claim from MIC. See App. 9a ("The premise of Yukon's first argument

(continued...)

b. Yukon Recovery, L.L.C. ("Yukon") has proceeded under the assumption that The ISLANDER was abandoned by its hull and cargo owners. To this end, and pursuant to the 1987 ASA, Yukon began survey operations, initiated an *in rem* admiralty arrest in the federal District Court, and secured (by stipulation) permission from the State of Alaska to explore and recover the wreck. The other salvor, Ocean Mar, Inc., chose, instead, to attempt to identify a putative owner for gold allegedly on board the vessel.

As was acknowledged by the District Court, see App. 20a, the record is devoid of any documentary evidence that gold cargo onboard The SS ISLANDER was insured, and that such an insurance claim ripened into a claim of title by subrogation. Ocean Mar nonetheless persuaded the courts below that gold cargo on board The ISLANDER was not abandoned, and that Ocean Mar, by virtue of its salvage contract with the insurer, was the proper salvor-in-possession of the wreck site. This Petition thus questions whether the Ninth Circuit erred in holding (a) that the Marine Insurance Company ("MIC") validly

[2](...continued)
is untenable because the district court's finding regarding abandonment is undisturbed on appeal"); 27a ("The court concludes that the arrest of light fixture does not, in and of itself, afford Yukon Recovery any legal status which is entitled to preference or legal priority over a contract salvor of cargo such as Ocean Mar."); 28a ("The court concludes as a matter of law that a contract salvor should be preferred over one such as Yukon Recovery which has no rights as regards the wreckage site beyond those associated with the arrest of the light fixture.").

In the event this Court would ultimately agree with Petitioner's submission that an incorrect standard of abandonment was applied below, the matter of Yukon's salvor-in-possession status would be left for reconsideration by the District Court on remand.

acquired subrogation title to particular cargo on board The ISLANDER shipped by the Canadian Bank of Commerce ("CBC"), and (b) did not subsequently abandon that title through its own inaction in the face of later salvage efforts.

As a matter of law, MIC could not have acquired a subrogation interest in gold on board The ISLANDER because it could not conclusively show *both* that (1) it had insured CBC's gold, *and* (2) that it had fully paid CBC for the loss. In the absence of documentary evidence of an insurance contract between CBC and MIC, and evidence of a claim fully paid, the District Court was legally obliged to have Ocean Mar otherwise prove, by clear and convincing evidence, MIC's claim. Instead, the Court of Appeals permitted Ocean Mar to prove its case with weak and circumstantial evidence, and only to a preponderance of the evidence standard.[3]

Moreover, the Ninth Circuit ruled (as a matter of law) that MIC had not later abandoned title to the cargo on board The ISLANDER by failing to object when an independent

[3] The Ninth Circuit opinion suggests that Yukon only raised on appeal the argument that MIC's subrogation right must be proven by clear and convincing evidence. App. 5a. In a Supplemental Trial Brief, filed in the District Court on July 10, 1998 (less than 6 weeks prior to the District Court's Judgment and Opinion, see App. 15a), Yukon clearly raised the contention that to the extent Ocean Mar was relying on a lost insurance policy or claims payments, such would have to be made "by clear and convincing, or strong and conclusive evidence." Dist. Ct. Docket No. 185, at 5. While Yukon submits that this issue has not been waived in earlier proceedings, it would be content to rest its Petition exclusively on the Ninth Circuit's holding (discussed next) that MIC's failure to object to salvage efforts on The ISLANDER did not effectuate an abandonment of the cargo.

salvor recovered much of the wreck in 1934. The Court of Appeals noted that although salvage efforts had been at least partially successful in recovering gold from the wreck, App. 6a-7a, that was not legally significant as to the gold cargo that remained on Alaska's submerged lands. Only if the 1934 salvage efforts had succeeded in raising the disputed cargo, the Ninth Circuit held, would that have acted as a dispositive renunciation of MIC's title. See App. 7a-8a.

The overall effect of the Ninth Circuit's ruling is to make it exceedingly easy for marine insurers to claim title (via subrogation) to lost hulls and cargoes, even in the absence of documentary proof of an insurance policy or claims made and satisfied. Once an insurer acquires title under this generous standard, the Ninth Circuit's approach is tantamount to requiring an express abandonment by the original owner or insurer of its rights in the lost property. Not even the failure to respond to subsequent salvage efforts undertaken by another party will be deemed to constitute evidence of abandonment. If left unreviewed, the standard of abandonment enunciated by the Ninth Circuit — as well as the evidentiary burdens assigned by that court in historic shipwreck cases — will inevitably result in *no* vessel or cargo being deemed abandoned, and one of Congress' essential purposes of the ASA (that States should manage abandoned shipwrecks) will be subverted.

REASONS FOR GRANTING THE PETITION

This Petition calls upon the Court to once again exercise its authority as the ultimate guardian of the integrity

and coherence of the nation's admiralty law. See *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411, 415 (1959) ("The issue is one of importance in the development of the law maritime, as to which we have large responsibilities, constitutionally conferred. . . ."). At stake here is the proper construction of the standard of abandonment in the Abandoned Shipwreck Act of 1987, Pub. L. No. 100-298 (Apr. 28, 1988), codified at 43 U.S.C. §§ 2101-06 (hereinafter the "Act" or "ASA"); App. 31a, and the legal disposition of — by Congress' own estimation — nearly 50,000 abandoned shipwrecks littering the navigable waters of the United States and situated on State submerged lands. See *Abandoned Shipwreck Act of 1987*, H.R. Rep. Nos. 100-514(I) & 100-514(II), 1988 U.S.C.C.A.N. at 365, 370. Review is necessitated of the Ninth Circuit's decision because it opens an already-wide split in the Courts of Appeals' divergent interpretations of the ASA, as well as subverting Congress' legislative purpose for the Act.

1. *The circuits are divided on the Abandoned Shipwreck Act's standard of abandonment and the burdens of proof to be assigned for such a standard.* In recent years, the Courts of Appeals have sharply disagreed among themselves as to when property lost at sea becomes abandoned, with the result of substantial confusion in maritime law. The division can be roughly characterized as points along a doctrinal continuum from express abandonment to implied abandonment to presumed abandonment.

This split has been noticed by the Courts of Appeals themselves,[4] and some have gone so far as to call for this Court's resolution of the matter:

> we agree that the [Fourth Circuit's] abandonment test was rejected by two other courts of appeal, the Ninth Circuit in *Deep Sea Research, Inc. v. The Brother Jonathan*, 102 F.3d 379, 387-88 (9th Cir. 1996), aff'd in part, vacated in part on other grounds, and remanded, 118 S.Ct. 1464, 1473 (1998) and the Sixth Circuit in *Fairport International Exploration, Inc. v. The Shipwrecked Vessel Known as the Captain Lawrence, in rem*, 105 F.3d 1078 (6th Cir. 1997), vacated and remanded on other grounds, 118 S. Ct. 1558 (1998)....A comparison of our earlier decision in this case in 974 F.2d 450 with the decision of the Supreme Court and the Ninth Circuit in *Brother Jonathan* and the Sixth Circuit in *Fairport* indicates that the rule for finding abandonment is more stringent in this circuit than in the Sixth Circuit and may be the same as the Ninth Circuit's rule in *Brother Jonathan*. In any event, the rule in

[4] These schisms have also been observed by commentators. See, e.g. John Paul Jones, *The United States Supreme Court and Treasure Salvage: Issues Remaining After* Brother Jonathan, 30 J. MAR. L. & COM. 205 (1999); D. David Lorello, Jr., Comment, *The Abandoned Shipwreck Act of 1987: Navigating through the Fog*, 35 GONZ. L. REV. 75 (1999/2000); Thompson M. Mayes, *Protection of Historic Shipwrecks - Outline of Legal Issues*, SD02 ALI-ABA 795 (1998); Sabrina L. McGlaughlin, *Roots, Relics and Recovery: What Went Wrong with the Abandoned Shipwreck Act of 1987*, 19 COLUM.-VLA J. L. & ARTS 149 (1995).

> the three circuits is not the same and the Supreme Court has not clarified the question . . . .

Columbus-America Discovery Group v. Atlantic Mut. Ins. Co., 203 F.3d 291, 304-04 (4th Cir. 2000). See also *Fairport Int'l Exploration, Inc. v. The Shipwrecked Vessel Known as the Captain Lawrence*, 105 F.3d 1078, 1084 (6th Cir. 1997); *Deep Sea Research, Inc. v. The Brother Jonathan*, 102 F.3d 379, 387-88 (9th Cir. 1996).

One Court of Appeals (the Fourth Circuit) has required evidence of express abandonment — an affirmative renunciation by an owner of property lost at sea — before property will be deemed abandoned under the ASA. See *Sea Hunt, Inc. v. Unidentified Vessel or Vessels*, 47 F. Supp.2d 678, 685-88 (E.D. Va. 1999) (relying upon *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 974 F.2d 450 (4th Cir. 1992), cert. denied, 507 U.S. 1000 (1993)).

At the other extreme, the First, Fifth and Eleventh Circuits appear to allow the inference of abandonment based merely on the passage of time, and so implicate a presumption of abandonment. *See, e.g., Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1064-65 (1st Cir. 1987); *Klein v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511, 1514 (11th Cir. 1985); *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 337 (5th Cir. 1978).

Occupying a middle position on the spectrum, but in further tension with other courts, the Sixth and Ninth Circuits

appear to each allow the inference of abandonment based on the totality of circumstances (an implied abandonment test), but are themselves in conflict regarding whether proof of abandonment requires "clear and convincing evidence" or, instead, simply a "preponderance." Compare *Deep Sea Research, Inc. v. The Brother Jonathan,* 102 F.3d 379, 387-88 (9th Cir. 1996); with *Fairport Int'l Exploration, Inc. v. The Shipwrecked Vessel Known as the Captain Lawrence,* 177 F.3d 491, 501 (6th Cir. 1999).

The absence of technology to effectuate a recovery of property lost at sea, as well as the legal significance of prior salvage efforts, appears also to be questioned in some circuits. It is not clear whether the absence of technology is a *per se* bar to a finding of abandonment, or instead one factor to be weighed with the totality of other evidence. See *Deep Sea Research, Inc. v. The Brother Jonathan,* 102 F.3d 379, 387-88 (9th Cir. 1996). Additionally, some circuits have relaxed the evidentiary burden of marine insurers in proving subrogation rights for long-lost insurance policies and claims. See *Columbus-America Discovery Group v. Atlantic Mutual Ins. Co.*, 56 F.3d 556, 576 (4th Cir. 1995) Thus, the division among the circuits goes beyond the strict definition of abandonment, and also extends to evidentiary presumptions and burdens of proof.

2. *The Ninth Circuit's decision underscores the conflict as to the ASA's proper standard of abandonment and subverts the ASA's intent to vest ownership of historic shipwrecks in the States.* The Ninth Circuit's decision in *Yukon Recovery* propounds a too-restrictive test of abandonment. The Ninth Circuit's *Yukon* decision permits marine underwriters to make claims to sunken hulls and cargoes they allegedly had long ago insured, even when (1) there is a lack of documentary proof of

the insurer having underwritten a risk or paid claims, and (2) even more importantly, where actual salvage had been undertaken on the wreck after it sunk, without the consent of the original owner or insurer.

The 1987 Abandoned Shipwreck Act, 43 U.S.C. § 2101 *et seq.*, establishes the basic parameters of State ownership of historic shipwrecks located in State waters. The fundamental purpose of the Act was to promote State management of historic shipwrecks and to encourage rational multiple-use of these resources. See id. §§ 2101(a), 2103, 2104(a); App. 31a-34a; see also *Abandoned Shipwreck Act of 1987*, H.R. Rep. No. 100-514(I), at 1-2; H.R. Rep. No. 100-514(II), at 5-6; reprinted in 1988 U.S.C.C.A.N. at 365, 365-66, 374-75. The Act grants to the States title to shipwrecks that are (1) abandoned *and* (2) either embedded in the submerged lands of the State *or* listed (or eligible for listing) on the National Registry of Historic Places. See id. § 2105(a); App. 34a-35a. While the ASA does not define the term "abandonment," Congress did indicate in its findings that it was concerned with sunken vessels "which have been deserted and to which the owner has relinquished ownership rights with no retention." Id. § 2101(b); App. 31a.

In this matter, Yukon has proceeded under the assumption that The ISLANDER was abandoned and that any recovery of its cargo would have to be sanctioned by the State of Alaska, as the owner of the wreck. To this end, Yukon secured the necessary permits from Alaska authorities. And while Ocean Mar procured the same permissions, its strategy later changed to a posture of asserting that the gold cargo was *not* abandoned. Ocean Mar seemingly preferred to negotiate with a pretended owner of the cargo, one that would have fewer

archaeological and environmental scruples than the State of Alaska's officials.

If the decision of the Ninth Circuit goes unreviewed here, one of the essential bases of State management of historic shipwrecks under the ASA will be seriously undermined: virtually any ship or cargo that was allegedly insured will be found to have an owner and thus not be abandoned. Potential salvors who wish to avoid State shipwreck regulation would need only procure the services of a cooperative marine insurer which, on the flimsiest of documentary evidence, would assert subrogation rights. And while Yukon is most certainly not arguing that abandonment should be lightly inferred, the Ninth Circuit's evidentiary standard radically shifts the balance in favor of a party that would seek to defeat State regulatory authority by allowing a claim of continued ownership with virtually no evidence.

Likewise, the Ninth Circuit's decision will offer incentives to marine insurers to engage in conduct that would seriously undermine established marine insurance law. In being generously forgiving of Marine Insurance Company's (MIC's) document retention policies, marine insurers may actually be encouraged to selectively destroy their business records. A marine insurer studying the decisions below might actually see advantage in retaining evidence of a general cover, or open form, policy, for a wide group of shippers, but destroy specific records of endorsements, certificates, or slips for specific shipments or cargoes. In that way, they might plausibly assert later that, since they were known to have insured a particular shipper's cargoes, they might be assumed to have insured a specific valuable cargo that can now be recovered. Likewise, the decision below will encourage marine insurers to more

readily discard records of premiums collected, claims paid or disputed, and express abandonments of insured cargoes. This behavior will result in a fundamental informational imbalance for a party seeking to demonstrate that a marine insurer never underwrote a particular cargo, or did not succeed via subrogation to the rights of the shipper (by paying claims).

To the extent that courts rely on negative inferences to determine ownership in historic shipwreck cases, any doctrinal incentive for an insurer to distort the documentary record of policies written, claims made, and titles abandoned, must be rejected. Ocean Mar has seemingly persuaded the Ninth Circuit that they can take more by proving less. And by crafting a new evidentiary standard of assessing insurer's claims in historic shipwreck cases, the Court of Appeals has profoundly unsettled Congress' intent in the ASA and disturbed established principles and customs of marine insurance.

By also ignoring previous salvage attempts, see App. 6a-8a, the Ninth Circuit seems also to endorse a rule that a marine insurer is never deemed to abandon a hull or cargo. The essence of the Ninth Circuit's decision in this regard is that unless a previous salvage attempt actually recovered material under a claim of ownership by a party, no inference of abandonment would be charged to that original owner. This results in an *ipse dixit* — property lost at sea is not abandoned by an original owner unless it is actually recovered by another party. In this respect, the Ninth Circuit's *Yukon* ruling essentially places it in alignment with the Fourth Circuit's express abandonment standard, articulated in *Columbus-America Discovery Group*, 974 F.2d 450 (4th Cir. 1992), and applied to wrecks covered by the ASA in *Sea Hunt, Inc. v. Unidentified, Shipwrecked Vessel or Vessels*, 47 F. Supp.2d 678 (E.D. Va. 1999).

Lastly, the Ninth Circuit's decision in *Yukon Recovery* appears to be in manifest tension with that of other circuits. Putting aside the question of whether the *Yukon* panel applied an express or implied standard of abandonment, that Court's handling of such issues as proof of marine insurance, and the legal significance of limitation proceedings and prior salvage attempts, creates a strong (if not irrebuttable) presumption of non-abandonment. This result has been criticized by other circuits. As the Sixth Circuit noted, "[c]ommon sense makes readily apparent that the [ASA] did not contemplate a court's requiring express abandonment; such explicit action is obviously rare indeed . . . ." *Fairport Int'l Exploration, Inc. v. The CAPTAIN LAWRENCE*, 105 F.3d 1078, 1085 (6th Cir. 1997), vacated on other grounds, 523 U.S. 1091 (1998).

Yukon Recovery, as Petitioner, would seek the Supreme Court's review in order to clarify the general maritime law's relevant standard of abandonment for shipwrecks otherwise subject to the terms of the ASA. At a minimum, this would mean that no evidentiary burden should be imposed against a State (or allied party) in showing abandonment. Moreover, the Court will be invited to consider whether special evidentiary rules need to be in place for proof (by a marine insurer) of a subrogation interest in a wreck. Lastly, the Court will need to consider whether the previous availability of technology or the means of recovery of a wreck site affects the determination of abandonment.

This Petition offers a chance to the Court to revisit the issue left open in *California v. Deep Sea Research, Inc.* — the precise contours of the ASA's standard of abandonment. This Court may well have believed that its reminder to apply the general maritime law of abandonment, 523 U.S. at 508, would

resolve any potential conflict among lower courts making such determinations. Alas, that hope has not been realized. Although Petitioner is mindful that a scant two years has followed this Court's decision in *Deep Sea Research*, the trend is for a further widening of circuit authority on this subject. Of the decisions issued since this Court's ruling,[5] each has reported a growing split, and no apparent move towards harmonization can reasonably be expected.

And while Petitioner understands that the very judicial nature of abandonment determinations is fact-intensive, the issue presented in many of these recent cases is truly one of legal standards and burdens of proof. Whatever rule this Court adopts, it will be applied by admiralty courts, the rulings of which will only be subject to review for clear error. It is especially incumbent in such situations that there be a coherent, national and uniform legal standard of abandonment for property lost at sea. This submission has particular force where the general maritime law intersects with an Act of Congress — such as the ASA — that evinces a significant policy preference for the management of underwater cultural heritage.

At stake in this Petition is the proper application of the general maritime law's standard of abandonment for property lost at sea, the enforcement of equitable rules for marine

[5] In addition to the Ninth Circuit's ruling in *Yukon*, see *Fairport International Exploration, Inc v. The Captain Lawrence*, 177 F.3d 491 (6th Cir. 1999), on remand, 72 F. Supp.2d 795 (W.D. Mich. 1999); *Sea Hunt, Inc. v. Unidentified Vessel or Vessels*, 47 F. Supp.2d 678 (E.D. Va. 1999); *The People ex rel. Illinois Historic Preservation Agency v. Zych*, 710 N.E.2d 820 (Ill. 1999); *Columbus-America Discovery Group v. Atlantic Mutual Ins. Co.*, 203 F.3d 291 (4th Cir. 2000).

insurers claiming subrogation rights in such property, and the effectuation of Congress' manifest intent in the Abandoned Shipwreck Act. Regrettably, the Ninth Circuit's ruling challenges each of these three objectives. Petitioner trusts that in its wise exercise of discretion to preserve the uniformity and harmony of the national maritime law, this Court will grant review here.

CONCLUSION

For the foregoing reasons, this Petition ought to be GRANTED.

Respectfully submitted,

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June 1, 2000

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YUKON RECOVERY, L.L.C., Plaintiff-Appellant,
v.
CERTAIN ABANDONED PROPERTY, in rem, Defendant,
Ocean Mar, Inc., Claimant-Appellee.

No. 98-36015.
United States Court of Appeals,
Ninth Circuit.
Argued and Submitted Dec. 6, 1999.
Filed March 7, 2000.

Appeal from the United States District Court for the District of Alaska; H. Russel Holland, Chief Judge, Presiding.
D.C. Nos. CV-96-00270-HRH, CV-96- 00304-HRH.

Before: REAVLEY,* REINHARDT and McKEOWN, Circuit Judges.

REAVLEY, Circuit Judge:

This is a contest for salvage rights to gold cargo in a shipwreck lying for a century on the bottom of the inland passage near Juneau. Yukon Recovery, L.L.C. (Yukon) appeals the judgment in favor of Ocean Mar, Inc. (Ocean Mar) granting rights to salvage the SS Islander. Yukon asserts that the district court applied the wrong standard of proof, erred in its ruling on abandonment, and erred in granting exclusive salvage rights to Ocean Mar. We affirm.

* The Honorable Thomas M. Reavley, Senior United States Circuit Judge for the United States Court of Appeals, Fifth Circuit, sitting by designation.

HISTORY OF THE CASE

The following facts are undisputed. The Islander sank in 1901 near Juneau en route from Skagway, Alaska to Vancouver, British Columbia. The Islander routinely carried Royal Canadian mail along with cargo and passengers. Many attempts to salvage the Islander were unsuccessful because the technology required to conduct salvage operations at that depth and water temperature did not exist at that time. Despite the lack of technological sophistication, an ingenious salvage effort by the salvage company called the Curtis/Wiley Group raised approximately two-thirds of the hull in 1934; however, 60 feet of the forward section had broken from the vessel and remained on the ocean floor. Ocean Mar determined the location of the wreck during expeditions to the site in 1993 and 1994 and executed a salvage contract in 1995 with Marine Insurance Company ("MIC") for salvage of any gold insured by MIC recovered from the site. In 1996 Yukon mounted an expedition to the site of the wreck and recovered a 1930's whiskey bottle and a light fixture from the area.

Yukon filed an in rem action seeking arrest of the artifacts, title to vessel and cargo at the wreckage site, exclusive rights as salvor of the wreckage site and injunctive relief against competing salvors. Ocean Mar, having obtained its salvage contract from MIC, was en route to conduct salvage activities at the site in 1996 when it was notified of a temporary restraining order obtained by Yukon. Ocean Mar appeared in the action brought by Yukon and filed a separate action seeking exclusive salvage rights. After consolidation of the cases, the district court held a bench trial on the merits, and entered findings of fact and conclusions of law.

The district court found the following facts by a preponderance of the evidence. The Islander sank with a large shipment of gold owned by the Canadian Bank of Commerce (CBC) sent by registered mail. MIC insured the gold and paid a claim entitling MIC to subrogation rights in the gold. The gold shipment was contained in a forward section of the vessel and therefore remained on the ocean floor after the 1934 salvage. Theodore Jaynes, the owner of Ocean Mar, carried out extensive research into the Islander and her cargo starting in 1989. Robert Mester, the owner of Yukon, conducted far less primary research and gathered information largely from other researchers. Mester acquired portions of Ocean Mar's proprietary funding proposal, which increased the urgency of his efforts to mount a competing salvage effort. Ocean Mar has all the financial and professional resources required to salvage the remaining cargo of the Islander. Neither Yukon nor Ocean Mar has obtained or retained actual, continuous and exclusive possession or occupancy of the wreckage site of the Islander or the surface of the water above the site.

The district court concluded that Ocean Mar was the first in modern times to find, observe, record and make a timely claim for the wreckage of the Islander. Arrest of the light fixture did not entitle Yukon to any priority over a contract salvor. Because competition would endanger lives, equipment, and artifacts, it is unsafe and technically unfeasible for two salvors to simultaneously work the wreckage site. Because it conducted thorough historical investigation and was the first in recent times to locate the wreckage of the Islander, Ocean Mar is entitled to exclusive salvage rights, even absent actual possession or physical presence at the site. The district court concluded that MIC has not abandoned its rights in the gold and Ocean Mar is entitled to perform its salvage contract for the

gold cargo owned by MIC.

The district court dismissed Yukon's petition, granted Ocean Mar exclusive rights to salvage the Islander, and enjoined Yukon from exploring or conducting salvage operations at the Islander site. The district court ordered Ocean Mar to submit a salvage plan, keep detailed records of all property raised at the wreckage site and sequester all gold and other property raised for the determination of ownership rights under the court's continuing jurisdiction over the case.

POINTS OF APPEAL[1]

Yukon asserts that the district court should have applied a clear and convincing standard of proof to the determination of MIC's rights in the cargo, and that the evidence conclusively establishes that MIC abandoned any interest it held in the cargo. Yukon further argues that its in rem arrest of artifacts from the wreck site requires the district court to grant it exclusive rights as salvor in possession. Alternatively, Yukon asserts that the district court should have granted it access to the wreck as co-salvor.

[1] Yukon has filed a motion to strike Ocean Mar's brief on the grounds of lapse of corporate status for failure to pay Delaware franchise taxes. Ocean Mar responds with a request to take judicial notice of its reinstatement. The capacity of a corporation to sue and be sued is determined according to the laws of the jurisdiction where the corporation is organized. Fed.R.Civ.P. 17(b). Delaware law provides an automatic three year extension of corporate existence for the purpose of prosecuting or defending any lawsuit begun prior to or within three years after corporate dissolution. See City Investing Co. Liquidating Trust v. Continental Cas. Co., 624 A.2d 1191, 1195 (Del.1993) (citing 8 Del. C. § 278). The motion to strike is denied.

PROOF OF MIC'S OWNERSHIP

The district court held that, absent abandonment, MIC is the owner of the Islander's gold. It reached this conclusion by finding that MIC had insured the gold and paid the insurance claim, entitling it to subrogation rights in the gold. Yukon argues that the district court's finding of fact is clearly erroneous because the court evaluated the evidence under the wrong burden of proof.

We reject Yukon's challenge to the burden of proof employed by the district court, because both Yukon and Ocean Mar agreed below that the question of the ownership of the gold was governed by the standard the district court employed. Before the district court, Yukon sought a finding of fact on this issue under the preponderance-of-the-evidence standard. On appeal, however, Yukon for the first time asserts that MIC's subrogation rights must be proved by clear and convincing evidence. Yukon argues that the law of Alaska requires clear and convincing evidence in the absence of documentary proof of an insurance policy and payment of a claim. Alternatively, Yukon also argues that it is entitled to invoke the English law of marine insurance which requires proof by a heightened evidentiary standard. We need not address Yukon's arguments regarding choice of law, however, because it may not now argue against the preponderance-of-the-evidence standard that it asked the district court to apply at trial. If the district court erred (and we do not suggest that it did), the error was invited.

Putting aside its untimely argument, Yukon has not challenged the sufficiency of the evidence to support the district court's subrogation finding under the standard of proof applied at trial. Review of the record demonstrates that there is

sufficient evidence to support the district court's finding as to MIC's subrogation rights in the Islander cargo under the preponderance-of-the-evidence standard, and that the finding is not clearly erroneous.

PROOF OF ABANDONMENT[2]

Yukon argues that two pieces of evidence conclusively demonstrate that MIC abandoned any interest it may have in the cargo of the Islander. Yukon argues that MIC's failure to file a claim in the 1901 admiralty limitation of liability proceeding brought by Canadian Pacific Navigation Company conclusively establishes that MIC abandoned its interest in the cargo. The district court found that it was not unusual that MIC declined to file a claim, which was supported by testimony from an expert witness on insurance practices. This conclusion is not unreasonable given that the limitation fund included only the value of the Islander's lifeboats and a small amount of freight due on the voyage. The only preclusive effect of failure to file a claim in the limitation proceeding is that it bars recovery from CPNC, which is not the equivalent of abandonment of title to lost property.

Neither of these parties claim any connection with the 1934 salvage operation by Curtis/Wiley, but Yukon claims that

[2] Admiralty salvage cases occasionally employ the term "abandonment" for two distinct meanings. One meaning is the same as "derelict" which refers to circumstances where the master or owner is no longer in physical possession of the vessel. Title to a derelict vessel is held by the owner unless its title has been "abandoned" according to the second meaning of this term, which renders the vessel subject to the law of finds rather than salvage. For the sake of clarity, the term "abandonment" is used here only to refer to property in which title has been abandoned.

this operation conclusively establishes MIC's abandonment of any claim to the cargo. First, Yukon argues that because the salvage was partially successful, the district court erred in ruling that the technology to salvage the Islander did not exist until very recently. Because the district court relied on the lack of technology as a factor in its determination that MIC's inaction did not constitute abandonment, Yukon argues that the 1934 salvage proves that the district court should not have relied on the absence of technology as a factor.

The 1934 salvage effort failed to bring up the section of the ship containing the mail gold storage hold because the bow of the ship had broken free from the remainder of the hull. There is nothing to suggest that the extremely primitive, although ingenious, technology utilized in the 1934 salvage was a viable method for recovering the forward section of the Islander; therefore the failure to attempt a second salvage with the same technology does not constitute evidence of abandonment of the cargo in the forward holds. Both Yukon and Ocean Mar used the most modern sonar and remote diving technology to locate and explore the remaining wreckage field and Yukon cannot reasonably contend that the same results could have been accomplished with the technology available in the 1930's. It is only by virtue of modern technological advances that the current salvage attempt is within the realm of possibility. The district court properly acknowledged that lack of technology is one factor to consider in determining whether inaction constitutes abandonment. See Deep Sea Research, Inc. v. The Brother Jonathan.[3]

[3] 102 F.3d 379, 388 (9th Cir.1996) (Aff'd in part, vacated in part California v. Deep Sea Research, 523 U.S. 491, 118 S.Ct. 1464, 140 L.Ed.2d

(continued...)

Yukon proceeds with an entirely different tack to argue that failure to object to the 1934 salvage is direct evidence of abandonment because MIC should have asserted its rights during the commencement of the salvage. The problem with this argument is that MIC was not required to object to the 1934 salvage in order to preserve its claim to the cargo. Salvage law grants the salvor only a superior right of possession to recovered property, and not title, until a court has passed on title and a salvage award. See Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel (Treasure Salvors III)[4]; Hener v. United States.[5] The 1934 salvor failed to raise the mail gold, and title to the gold was not then at issue.

The district court heard substantial testimony, reviewed copious exhibits, and determined from all the facts and circumstances that MIC had not abandoned its rights in the gold. Neither the limitation proceeding nor the 1934 salvage constitute conclusive evidence to the contrary. The district court applied a preponderance of the evidence standard to the question of abandonment, and the sufficiency of the evidence to support the district court's determination has not been directly challenged in this appeal.

EXCLUSIVE SALVAGE RIGHTS

Yukon contends that the district court erred in granting

[3](...continued)
626 (1998)).

[4] 640 F.2d 560, 567 (5th Cir.1981).

[5] 525 F.Supp. 350, 357 (S.D.N.Y.1981).

exclusive salvage rights to Ocean Mar and not to Yukon. Yukon argues that the Islander is abandoned property and therefore the salvage contract between Ocean Mar and MIC is ineffective to confer priority on Ocean Mar. Yukon further argues that it is entitled to priority because it was the first to file an in rem proceeding and present artifacts from the wreck site for arrest. Because the presentation of artifacts is merely a jurisdictional mechanism, Yukon is mistaken in its assertion that being first to arrive at the courthouse confers priority rights as a salvor.

The premise of Yukon's first argument is untenable because the district court's finding regarding abandonment is undisturbed on appeal. Even if the premise were correct and the cargo had been abandoned, Yukon's claim to priority does not flow automatically by virtue of its filing for in rem arrest. Filing an in rem arrest of recovered items merely confers in rem jurisdiction in the district court over the recovered property. See Martha's Vineyard Scuba Headquarters, Inc. v. The Unidentified, Wrecked and Abandoned Steam Vessel.[6] Filing an in rem petition for arrest of artifacts does not automatically confer exclusive rights to a site as salvor in possession. See MDM Salvage, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel;[7] See also Indian River Recovery Co. v. The China;[8] Marex Titanic, Inc. v. Wrecked and Abandoned Vessel,

[6] 833 F.2d 1059, 1062 (1st Cir.1987).

[7] 631 F.Supp. 308, 312 (S.D.Fla.1986).

[8] 645 F.Supp. 141 (D.Del.1986) (first to file in rem complaint enjoined from salvage activities).

RMS TITANIC.[9] Because an in rem complaint and admiralty arrest of recovered artifacts merely confer jurisdiction in the district court, and do not automatically create exclusive salvage rights, Yukon's basis for claiming salvor in possession status fails.

Yukon further challenges the award of exclusive salvage rights to Ocean Mar. Courts frequently use actual or constructive possession of the wreck site as grounds for a grant of exclusive salvage rights. See Treasure Salvors III, 640 F.2d at 572; Hener, 525 F.Supp. at 357; Cobb Coin Co., Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel.[10] To maintain an exclusive franchise, the salvor must undertake ongoing salvage operations with due diligence which are clothed with some prospect of success. Martha's Vineyard, 833 F.2d at 1061. The district court found that Ocean Mar had all the resources necessary to successfully salvage the remaining cargo of the Islander; however, because the district court found that neither Yukon nor Ocean Mar had obtained actual, continuous and exclusive possession or occupancy of the wreckage site of the Islander or the surface of the water above the site, possession cannot be utilized to determine exclusive salvage rights.

The failure of the parties to engage in ongoing salvage operations is understandable in light of the changes in salvage

[9] 805 F.Supp. 375, 377 (E.D.Va.1992) (exclusive salvage claims between first to file and intervenor requires trial on the merits.) (rev'd on other grounds, 2 F.3d 544 (4th Cir.1993)).

[10] 525 F.Supp. 186, 195 (S.D.Fla.1981).

law wrought by the Abandoned Shipwreck Act (ASA).[11] Apart from this change, salvage law encourages salvors to undertake risks to rescue imperiled maritime property through generous salvage awards by admiralty courts. Treasure Salvors III, 640 F.2d at 567. The expenditures required to establish constructive possession and ongoing salvage operations for sunken ships were justified by the prospect of a grant of exclusive salvage rights and a liberal award from any salvaged property. Therefore courts could expect that salvors would establish occupancy and engage in ongoing salvage prior to the institution of legal proceedings.

Under the ASA, however, salvors seeking to raise long lost wrecks in state waters can no longer engage in ongoing salvage operations with confident expectations of a liberal salvage award to compensate them for the investment. Under the ASA, the United States asserts title to all abandoned shipwrecks that are embedded in the submerged lands of a state, embedded in the coralline formations protected by a state on submerged lands of a state, or on submerged lands of a state and either included or eligible for inclusion in the national register.[12] The ASA transfers title in all such shipwrecks to the state in or on the land of which the shipwreck is located.[13] The laws of salvage and finds do not apply to shipwrecks subject to § 2105 of the

[11] 43 U.S.C. § 2101, et seq.

[12] 43 U.S.C. § 2105(a).

[13] 43 U.S.C. § 2105(d).

ASA.[14]

The ASA creates uncertainty when a salvor cannot determine in advance whether a wreck is "abandoned" or "embedded" and therefore subject to the ASA and questions of fact to be decided by the court. A salvor could expend immense resources to locate, survey and salvage a wreck only to have the court later rule that the salvor is entitled to nothing because the ASA displaces the law of salvage. Both of the parties to this litigation have expended significant resources to locate the Islander but prudently avoided costly salvage operations which could have resulted in a total loss under the ASA. Because neither party established occupancy and ongoing salvage operations, we must look to other factors for the determination of exclusive salvage rights.

The grant of exclusive salvage rights is subject to equitable considerations. See Treasure Salvors III, 640 F.2d at 573 ("equitable considerations come into play in determining the legal protection afforded a finder."); Hener, 525 F.Supp. at 358 (admiralty courts may be flexible in determining whether a salvor has commenced an operation worthy of protection.); See also R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel.[15] In addition to occupancy and prospects of success, courts have looked to a variety of other equitable factors to analyze competing salvage claims. For example, courts consider whether the salvor has conducted independent historical research on the vessel and has acted in good faith. See Deep Sea

[14] 43 U.S.C. § 2106(a).

[15] 924 F.Supp. 714, 720 (E.D.Va.1996).

Research, Inc. v. The Brother Jonathan.[16] Courts also grant exclusive rights to the first finder over subsequent finders.[17] See Martha's Vineyard, 833 F.2d at 1065; The China, 645 F.Supp. at 144; Deep Sea Research, 883 F.Supp. at 1361 (first finder of lost wreck may acquire exclusive rights to salvage).

The district court made several specific findings that support its decision to grant Ocean Mar exclusive salvage rights. The district court found that Ocean Mar was the first in modern times to find and claim the wreckage of the Islander. The district court also found that Ocean Mar's research into the history of the Islander was by far more thorough than Yukon's. The district court also found that Yukon's acquisition of Ocean Mar's proprietary information concerning the estimated value of the gold cargo influenced Yukon's attempt to mount a competing salvage operation. All of these findings are supported by evidence in the record and support the district court's decision to award exclusive salvage rights to Ocean Mar.

The district court also concluded that Ocean Mar was entitled to priority by virtue of its status as a contract salvor. Yukon contends that the district court erred in conferring priority on the basis of contract salvor status. We find little direct authority on this point; however, the precedents that exist suggest that a contract salvor may be granted priority over a

[16] 883 F.Supp. 1343, 1362 (N.D.Cal.1995).

[17] The term "Finder" as used in salvage cases does not necessarily mean that title to the vessel is abandoned and therefore subject to the law of finds. The exclusive rights to salvage a vessel may be awarded to the first to discover the location of a lost ship wreck even if the title to the wreck is still vested in the original owner.

volunteer salvor. See Vol. 3A, M. Norris Benedict On Admiralty: The Law of Salvage, §152 (7th Ed. rev.1997); See Quantity of Iron.[18] We also note authority for the proposition that an owner may reject salvage by a volunteer. See Platoro Ltd., Inc. v. Unidentified Remains Of A Vessel.[19] It is reasonable that the law should support the right of an owner to select a salvor for shipwrecked property rather than be subjected to a salvage award granted to a volunteer. The district court properly granted priority to Ocean Mar by virtue of its equitable claim as first finder and its salvage contract.

CO-SALVOR STATUS

Yukon argues that the district court should have granted it rights as co-salvor of the Islander. As indicated above, the first finder is entitled to exclusive salvage rights so long as it engages in diligent efforts clothed in some prospect of successful salvage. Ocean Mar, as first finder, is entitled to this protection and Yukon has not presented any compelling reason for departing from the rule. In addition, the district court specifically found that co-salvage would endanger lives, valuable equipment, and artifacts from the site because it would create competition to recover the gold cargo. The district did not err in refusing Yukon's request for co-salvor status.

AFFIRMED.

[18] 20 F. Cas. 120 (D.Mass.1862).

[19] 695 F.2d 893, 901 (5th Cir.1983).

YUKON RECOVERY, L.L.C., Plaintiff,

v.

CERTAIN ABONDONED PROPERTY, in rem, Defendant.

OCEAN MAR, INC., Plaintiff,

v.

THE CARGO OF THE SS ISLANDER, Defendant.

Nos. A96-0270-CV (HRH), A96-0304-CV (HRH).
United States District Court, D. Alaska.
Aug. 28, 1998.

JUDGMENT IN A CIVIL CASE

HOLLAND, J.

X DECISION BY COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:

THAT plaintiff's complaint is dismissed with prejudice and judgment is hereby entered in favor of Ocean Mar Inc. Marine Insurance Company is the true and lawful owner of Canadian Bank of Commerce cargo lost in the sinking of the SS Islander, and Ocean Mar is the duly authorized contract salvor of Marine Insurance Company. Yukon Recovery, LLC, its agents, servants, employees, and all others acting in concert with them, are enjoined from taking any further action with respect to exploring or conducting salvage operations at the site of the sinking of the SS Islander, and from interfering in any way with the salvage

operations at that site to be undertaken by Ocean Mar Inc.

FINDINGS OF FACT & CONCLUSIONS OF LAW

This case was tried to the court without a jury commencing on July 13, 1997. Based upon the parties' statement of uncontested facts and upon the testimony and exhibits received at trial. The court herewith makes its findings of fact and conclusions of law.

FINDINGS OF FACT

(1) In 1897, news that gold had been discovered in the Klondike River and its tributaries in what is now the Yukon Territory of Canada reached the settled parts of North America. A great rush of people descended upon the Klondike River and resulted in the development of the city of Dawson, Yukon Territory, at the confluence of the Yukon and Klondike Rivers. In 1898 and thereafter, huge quantities of placer gold were extracted in the area. Much of the gold was brought to Dawson where raw gold served as the medium for exchange until banking institutions were set up in that city.

(2) By the late summer of 1898, both the British Bank of North America and the Canadian Bank of Commerce had opened branches in Dawson. Both banks set about purchasing huge quantities of raw gold at a price of $16 per ounce less the bank's cost of transporting the gold to a smelter and refiner and the cost of insurance. The banks exchanged their privately issued notes for the gold, and by 1901 bank notes rather than raw gold were by and large the medium of exchange in Dawson. By 1901, very substantial portions of the gold production were converted to notes by the banks, which stored the gold in vaults until it could

be shipped to smelters located in the Pacific Northwest.

(3) By 1901, companies owned or controlled by the Hudson Bay Company had set up steamship service during the summers between Dawson and Whitehorse, Yukon Territory, and railroad service between Whitehorse and the tidewater port of Skagway in the Territory of Alaska. In addition, the Hudson Bay Company, through the Canadian Pacific Railway, had acquired and was operating the Canadian Pacific Navigation Company, which provided steamer service between Skagway and Vancouver, British Columbia.

(4) During the summer of 1901, the Canadian Pacific Navigation Company operated the steamship SS Islander between the ports of Skagway, Alaska, and Vancouver, British Columbia. The SS Islander was built in Glasgow, Scotland, in 1888 for the Canadian Pacific Navigation Company. She was a steel-hulled, twin screw, passenger vessel, powered by a triple expansion steam engine capable of producing 15 knots. The SS Islander was 240 feet long; her beam was 42 feet. Although a passenger liner, she was capable of carrying limited cargo such as mail, including registered mail.

(5) The SS Islander departed Skagway on August 14, 1901. The court finds[1] that when the SS Islander departed Skagway, it was

[1] When the court uses the expression "the court finds", and even where that rubric is not employed, the court means to convey the notion that, having considered all of the evidence, the court is convinced that the party having the burden of proof (the affirmative) of a fact issue has convinced the court that such fact is more likely true than not true--the standard preponderance of the evidence evaluation. Also, the court means to imply that it has made all reasonable inferences which may be drawn from facts

(continued...)

carrying a large shipment of gold owned by the Canadian Bank of Commerce, destined for delivery to smelters and refiners in the Pacific Northwest. While it is clear that there were river steamers operating between Dawson City and Whitehorse, Yukon Territory, and that a railroad operated between Whitehorse and Skagway, Alaska, there is scant evidence (no bills of lading or other records) as to how the SS Islander shipment in question actually moved between Dawson City and Skagway, Alaska. Based upon the evidence which has been produced, the court finds that the Canadian Bank of Commerce of Dawson, Yukon Territory, more probably than not made a large shipment of gold in August of 1901 which was in the custody of the Northwest Mounted Police as registered mail matter from their departure from Dawson, Yukon Territory, until the sinking of the SS Islander on August 15, 1901. The evidence is clear that steel-banded, wooden boxes, such as those known to have been used by the Canadian Bank of Commerce to ship gold bricks reached Skagway and were seen on the docks on or about August 14, 1901, and were subsequently loaded upon the SS Islander. The shipment was accompanied by three Northwest Mounted Police Officers in accordance with an agreement between the Canadian Bank of Commerce and the Canadian Government.[2]

[1](...continued)
which have been proved by a preponderance of the evidence.

[2] As with other matters here at issue, the records of the agreement by which the Canadian Bank of Commerce acted as royalty collector for the Canadian government are incomplete. The court finds there was an agreement by which the Canadian Bank of Commerce paid the Canadian government for royalty gold, and the government provided Northwest Mounted Police guards for gold shipments.

(6) The SS Islander proceeded to Juneau, Alaska. The SS Islander departed Juneau late on August 14 or early August 15, 1901, proceeding south down the Gastineau Channel. At approximately 2:00 a.m. on August 15, 1901, at a point near the confluence of the Gastineau Channel, Stephens Passage, and Taku Inlet, the SS Islander struck a submerged object[3] and sunk, bow first, in some 365 feet of water.

(7) The Canadian Pacific Navigation Company instituted limitation of liability proceedings in the district court in Seattle, Washington. The limitation of liability proceedings make no mention of any claim on behalf of the Canadian banks doing business in Dawson, Yukon Territory, or their insurers. The court finds that it would not be unusual for cargo insurers to leave it to other interested parties to establish the right to proceed against the vessel owner. Ultimately the owners were granted limitation of liability, and the claimants were left to divide up the minimal value of lifeboats from the SS Islander which were the only salvage then available.

(8) Shortly after the sinking, there was publicity of possible efforts to raise the SS Islander. The court finds that these efforts were undertaken on behalf of the underwriters who insured the

[3] There has long been uncertainty and disagreement as to the cause of the collision which resulted in the sinking of the SS Islander. The official investigation of the incident appears to have concluded that the vessel collided with a large iceberg, possibly calved off the Taku Glacier. Others suspect that the pilot and captain of the SS Islander were intoxicated at the time of the collision, and that the vessel was holed by a submerged rock or ledge which did not strand the vessel. The cause of the sinking is no longer of any import.

gold shipment, not the hull of the vessel.[4] The early efforts at salvaging the SS Islander were unsuccessful. She had sunk in water too deep for equipment available at the turn of the century.

(9) However, efforts continued periodically, and salvors, apparently having no connection with any insurer, undertook to and did successfully raise the SS Islander in 1934. Perhaps because of the damage caused in the collision, perhaps because the vessel sunk bow first, and perhaps because of the placement of cables used to raise the hull of the SS Islander, or all of the foregoing, the entire hull of the vessel was not recovered. A 60-foot bow section of the vessel was left behind in 1934. The bank shipment of gold carried by the SS Islander was more probably than not placed in one or more storerooms in the forward section of the vessel which was not recovered in 1934.

(10) Although there is a dearth of business records with respect to insurance of the gold on the SS Islander on August 14, 1901, the court finds that more probably than not the Canadian Bank of Commerce insured the gold shipped on the SS Islander. Canadian postal authorities did not have in place insurance covering registered mail on the SS Islander on August 14, 1901.

[4] A contemporaneous newspaper article reported that deep sea diver Dick Meyer "has been engaged by the English Marine Insurance Company to go to Juneau in August and go down to the boat and explore her position." Ocean Mar's Exhibit G. In light of the fact that the insured value of the gold shipped on the SS Islander more probably than not far exceeded the $75,000.00 for which the hull of the SS Islander was insured (several million dollars of gold versus $75,000.00 hull insurance), the Marine Insurance Company (see Paragraph (11), infra), as insurer of registered mail, would have a far greater interest in pursuing salvage, even at great depths, than would the hull insurer.

(11) More probably than not, the Canadian Bank of Commerce obtained "open cover"[5] insurance for its gold shipments. Contemporaneous bank records, including in particular records of negotiations between the Canadian Bank of Commerce and the Canadian government, as well as the written history of the Canadian Bank of Commerce, all reflect that it was the practice of the Canadian Bank of Commerce to insure its gold shipments out of the Yukon Territory. Conservative institutions that they are (and no doubt were), a bank would more probably than not insure the actual cash value of the gold. Having insured the gold, it is highly improbable that the Canadian Bank of Commerce would not have made a claim, or that it would have quietly failed to recover on that claim. The fact that hull claims were paid strongly suggests that cargo claims in connection with the loss of the SS Islander would also have been paid by British insurers. Also, the Canadian Bank of Commerce was dealing with the Marine Insurance Company as to other insurance matters in 1903, which suggests a continuing satisfactory business relationship between them.

(12) The court finds that the Marine Insurance Company, now a subsidiary of the Royal Sun Alliance Group of insurance companies, more probably than not insured the Canadian Bank of Commerce registered mail shipment of gold on the SS Islander on August 14, 1901, and more probably than not paid the then full cash value of the loss. The Marine Insurance Company was authorized to sell insurance for registered mail sent between points in Canada. The court finds that the Marine

[5] A form of insurance for regular shipments which Marine Insurance's Mr. Matthews described as an annual rolling contract of insurance which took the place of discrete polices of insurance for each shipment.

Insurance Company at the time at issue was by and large a cargo insurer, that it had the capacity to join with other underwriters to insure very valuable registered mail, and that it specialized in insuring cargo such as gold at the time in question. The court finds that the loss and/or destruction[6] of Marine Insurance Company records from the early 1900s with respect to insuring Canadian Bank of Commerce is not so inconsistent with it's subrogation and other rights associated with the payment of a loss as to constitute an abandonment of those rights for the reason that in 1901 and for many years thereafter (indeed, until the 1980s), recovery of the cargo of the SS Islander was not technically feasible.

(13) Both Theodore Jaynes and Robert Mester learned of the sinking of the SS Islander and its possibly valuable, unrecovered cargo in the mid- 1980s. Mr. Jaynes commenced serious research efforts in 1989, and has carried on those efforts since then. His research efforts have been far more extensive than those of Mr. Mester who, the court finds, has by and large gathered information from other people who were interested in or associated with treasure hunting and remote-controlled deep sea recovery work, as distinguished from doing basic research such as searching out all of the business records, newspaper articles, and other historical records of the loss of the SS Islander.

(14) By 1993, Jaynes had formed Ocean Mar, Inc., and was its principal. In June of 1993, Ocean Mar did a baseline survey of the seabed in the vicinity of the wreck site of the SS Islander.

[6] As Mr. Matthews noted, there were two world wars between 1901 and the 1990s. The court takes judicial notice of the fact that London (where the Marine Insurance Company is located) was subjected to heavy aerial bombing during World War II.

Jaynes and his crew found the bow of the SS Islander in June of 1993. During July and August of 1994, Ocean Mar returned to the site of the sinking of the SS Islander with additional equipment, including high resolution, multi-scan sonar equipment and television equipment.[7] Both of these units provided visual images of the seabed of the wreck site and confirmed the observations by Jaynes in 1993. In 1994, Jaynes identified on the seabed the kind of wooden, steel-banded boxes used by the Canadian Bank of Commerce in shipping gold from Dawson to Vancouver via the SS Islander. Jaynes also observed a partially buried, single gold bar.

(15) In August of 1995, the Marine Insurance Company, the Salvage Association (agent for Marine Insurance), and Ocean Mar, Inc., entered into a salvage contract with respect to the cargo of the SS Islander.[8] The salvage contract is for a term of five years, and is a "no salvage, no pay" contract-- meaning that Ocean Mar is entitled to no compensation if cargo is not recovered, and, if cargo is recovered, the agreement provides for and agreed- upon division of the cargo between Marine Insurance Company and Ocean Mar.

(16) With a salvage contract in hand, Ocean Mar began planning a recovery effort to be undertaken in the summer of 1996.

[7] Because of equipment failure, the television images were not saved on video tape.

[8] It took Jaynes approximately a year (that is, from August of 1994 until August of 1995) to obtain Marine Insurance's concurrence in a salvage contract. The court finds that Marine Insurance thoroughly investigated its situation before entering into the contract with Ocean Mar. Ocean Mar determined to make no further effort at exploration or recovery until a salvage contract was in hand.

Principals of Yukon Recovery learned of Mr. Jaynes' plans for a recovery effort in late 1995 or early 1996. Yukon Recovery was formed in late 1995, and immediately began making inquiries, especially directed at the State of Alaska, with respect to a search effort of its own. In the process, Yukon Recovery came into possession of portions of a funding proposal prepared by former Outside counsel to Ocean Mar, Inc. This information did not materially assist Yukon Recovery in its efforts to locate the SS Islander. However, access to Ocean Mar's proprietary, financial projections undoubtedly added to Yukon Recovery's enthusiasm and sense of urgency with respect to mounting their own, competing effort to locate the remains of the SS Islander.

(17) Yukon Recovery assembled equipment similar to that employed by Ocean Mar. Both companies have access to state-of-the-art, remote-controlled vehicles (submersibles), side-scan sonar, underwater television equipment, robotic arms or manipulators, and the like. As Jaynes had earlier done, Mester and Yukon Recovery rather quickly identified the site of the wreck of the SS Islander[9] in mid-June of 1996. Yukon Recovery raised a whiskey bottle and a brass light fixture from the wreck site.[10] Yukon Recovery did not raise or report seeing any cargo of the SS Islander. With these artifacts, and expecting that Ocean Mar, Inc., would return to the site of the wreckage of the SS

[9] Each of the parties has filed under seal the geographic coordinates for the site which each has located, and the court is satisfied that both parties have identified the same site.

[10] It was conceded that the whiskey bottle was of a 1930 vintage, presumably left by the salvors who had raised the bulk of the SS Islander in 1934. The whiskey bottle is not an artifact of the SS Islander. The light fixture came from the site of the sinking of the SS Islander, but is not otherwise authenticated as an artifact of that vessel.

Islander, Yukon Recovery commenced an in rem proceeding in this court and caused the arrest of the bottle and light fixture by the United States Marshal. Having become aware of this litigation, Ocean Mar, Inc., filed a claim and also commenced separate litigation against the cargo of the SS Islander, Ocean Mar, Inc., seeking a declaration of title and right to possession of the cargo.[11]

(18) Ocean Mar did indeed return to the wreck site in 1996 to undertake salvage operations. Ocean Mar was shortly informed of this court's temporary restraining order of August 2, 1996, which temporarily suspended its operations. In due course, the temporary restraining order was converted to a preliminary injunction[12] which, among other things, permitted both companies (Yukon Recovery and Ocean Mar) to conduct reconnaissance operations so long as they maintained a reasonable distance from and did not interfere with one another. The court precluded any recovery operations by either company in order that the status quo be maintained pending a resolution of the competing claims between the parties which are now before the court. At no time relevant to this case has either Yukon Recovery or Ocean Mar obtained and retained (with or without court approval) actual, continuous, exclusive possession or occupancy of the wreckage site of the SS Islander or the surface of the marine waters of Alaska above it.

[11] Ocean Mar, Inc. v. The Cargo of the SS Islander, Case No. A96-0304-CV (HRH), which case was consolidated with Yukon Recovery's in rem action by order of November 19, 1996. (Clerk's Docket No. 10 in Ocean Mar's case.)

[12] Preliminary Injunction, filed August 14, 1996, Clerk's Docket No. 95.

(19) Both Yukon Recovery and Ocean Mar have entered into contractual arrangements with the State of Alaska with respect to the preservation of artifacts which one or the other might recover.

(20) The court finds that Ocean Mar has or has available to it all of the resources necessary to carry on a well organized, professional, safe, salvage effort with respect to the wreckage of the SS Islander. The court finds that Ocean Mar has sufficient financial resources, and that with these resources there is readily available people with the requisite expertise and equipment to efficiently and safely salvage the cargo which was aboard the remaining submerged section of the SS Islander.

CONCLUSIONS OF LAW

(21) By its in rem complaint[13] against certain abandoned property, Yukon Recovery sought to establish title in its favor with respect to abandoned property on the sea floor which was the remaining wreckage of the SS Islander. Yukon Recovery sought and obtained an order[14] authorizing the issuance of a warrant for the arrest of the abandoned property. The warrant was issued and executed by the United States Marshal upon the whiskey bottle and light fixture which Yukon Recovery returned from the wreckage site. The arrest warrant has never been executed upon any other property.

(22) Ocean Mar claims that it is the duly authorized salvage contractor of Marine Insurance Company and that, as such, it is

[13] Clerk's Docket No. 1.

[14] Clerk's Docket No. 6.

entitled to recover the cargo of the SS Islander in the form of gold bullion now owned by the Marine Insurance Company by reason of subrogation rights.

(23) Whether this court does or does not have admiralty jurisdiction of Yukon Recovery's claim is irrelevant, for the court has concluded that it does have jurisdiction of Ocean Mar's claim to salvage the cargo of the SS Islander as hereinafter set forth. Claims arising out of salvage operations--efforts to rescue or recover ships disabled or abandoned at sea or to retrieve their cargo--are, unquestionably within the admiralty jurisdiction of the federal courts." Treasure Salvors v. Unidentified Wrecked & Abandoned Sailing Vessel, 640 F.2d 560, 566 (5th Cir.1981) (emphasis supplied); 21 U.S.C. § 1333.

(24) Yukon Recovery has not obtained from the court any order granting Yukon Recovery exclusive access to the site in question nor entitling it to any cargo or other wreckage of the SS Islander. On the contrary, the court refused to grant Yukon Recovery exclusive control of the wreckage site, and expressly permitted both Yukon Recovery and Ocean Mar to proceed with exploration and mapping while at the same time maintaining the status quo of the wreckage itself. The court concludes that the arrest of light fixture does not, in and of itself, afford Yukon Recovery any legal status which is entitled to preference or legal priority over a contract salvor of cargo such as Ocean Mar.

(25) In earlier proceedings which are now incorporated herein, the court concluded that the cargo of the SS Islander had not been abandoned.[15] The Canadian Bank of Commerce gold shipment aboard the SS Islander on August 15, 1901, was not

[15] Clerk's Docket No. 151.

abandoned by Marine Insurance Company. The Marine Insurance Company became subrogated to the rights of the Canadian Bank of Commerce and, with respect to the gold shipment in question, has succeeded to ownership of the Canadian Bank of Commerce shipment by reason of having paid the value of it. With its agent, the Salvage Association, Marine Insurance Company has entered into a valid and subsisting salvage contract with Ocean Mar, and Ocean Mar is entitled to go forward with the performance of that contract for the purpose of salvaging from the wreckage of the SS Islander the Canadian Bank of Commerce gold shipment which is now the legal property of Marine Insurance Company subject to Ocean Mar's rights under the salvage contract.

(26) The court concludes as a matter of law that a contract salvor should be preferred over one such as Yukon Recovery which has no rights as regards the wreckage site beyond those associated with the arrest of the light fixture. Ocean Mar, Inc., is entitled to exclusive salvage rights with respect to the wreckage of the SS Islander.

(27) As to property at the site of the wreck of the SS Islander other than that of the successors in interest to the Canadian Bank of Commerce, and subject to the rights of the State of Alaska under its contract with Ocean Mar, Inc., the court concludes that Ocean Mar, Inc., not Yukon Recovery, was the first in modern times to find, observe, and record and make a timely claim for the wreckage of the SS Islander. Although neither Ocean Mar nor Yukon Recovery has reduced such property to possession, it would be unsafe and technically unfeasible for two salvors to work the same wreckage site. It will simply not do as a matter of public policy to permit these competing treasure hunters to risk lives and valuable equipment in actual, on-site competition to

see who will be the first to gain possession of what remains of the SS Islander and her cargo. Such a race for possession would create a grave risk of damage to valuable artifacts, even if both treasure hunters were to undertake the effort safely. Archeological work (and that is an apt description of efforts to raise portions of a 90-year-old wreck) simply cannot be undertaken in the haste which would surely attend the recovery if done under competition. Because Ocean Mar has by far done the more thorough and complete historical investigation, and because it was the first to locate and view the actual debris of the SS Islander, the court concludes that Ocean Mar alone is, by virtue of its discovery, legally entitled to that which it has found, even absent actual possession and even absent actual physical presence on site.

(28) Because it is possible that other claimants will emerge as the wreckage site is developed and cargo raised, and because former Canadian Bank of Commerce gold must be segregated, Ocean Mar must keep detailed records of all property raised at the site. In this regard, and before embarking upon active salvage operations, Ocean Mar shall prepare and submit to the court for its approval a plan for the preparation of an inventory of all items raised from the wreck site of the SS Islander and for the sequestration of all gold recovered at an approved facility within the jurisdiction of the court pending identification of that gold owned by Marine Insurance Company as successor in interest of the Canadian Bank of Commerce, subject of course, to Ocean Mar's contract salvage rights, and resolution of any other claims which may be asserted as regards gold or other artifacts raised from the site of the SS Islander, again subject to this court's determination of Ocean Mar's rights as a general salvor. In addition, this plan shall include Ocean Mar's proposal for how it and the court shall proceed as regards notice to other possible

claimants. The court will retain jurisdiction of this case, even after entry of judgment, for purposes of the resolution of claims as between Ocean Mar as salvor, the Salvage Association as agent for Marine Insurance Company, Ltd., and other claimants and the State of Alaska.

(29) Yukon Recovery's complaint is dismissed with prejudice. The clerk of court shall enter judgment in favor of Ocean Mar, declaring that Marine Insurance Company is the true and lawful owner of Canadian Bank of Commerce Cargo lost in the sinking of the SS Islander, and Ocean Mar is the duly authorized contract salvor of Marine Insurance Company. As such, Ocean Mar has sole and exclusive rights to locate and raise the cargo of the SS Islander, subject to the requirement that a plan for disposition of items recovered be submitted to the court for approval as set forth in Paragraph (28) of the court's findings of fact and conclusions of law. The judgment shall further provide that Yukon Recovery, LLC, its agents, servants, employees, and all others acting in concert with them, are enjoined from taking any further action with respect to exploring or conducting salvage operations at the site of the sinking of the SS Islander, and from interfering in any way with the salvage operations at that site to be undertaken by Ocean Mar. Inc.

The Abandoned Shipwreck Act

43 U.S.C. §§ 2101-2106 (2000)

§ 2101. Findings

The Congress finds that--

(a) States have the responsibility for management of a broad range of living and nonliving resources in State waters and submerged lands; and

(b) included in the range of resources are certain abandoned shipwrecks, which have been deserted and to which the owner has relinquished ownership rights with no retention.

§ 2102. Definitions

For purposes of this Act [43 U.S.C. §§ 2101 et seq.]--

(a) the term "embedded" means firmly affixed in the submerged lands or in coralline formations such that the use of tools of excavation is required in order to move the bottom sediments to gain access to the shipwreck, its cargo, and any part thereof;

(b) the term "National Register" means the National Register of Historic Places maintained by the Secretary of the Interior under section 101 of the National Historic Preservation Act (16 U.S.C. 470a);

(c) the terms "public lands", "Indian lands", and "Indian tribe" have the same meaning given the terms in the Archaeological Resource Protection Act of 1979 (16 U.S.C. 470aa-470ll);

(d) the term "shipwreck" means a vessel or wreck, its cargo, and other contents;

(e) the term "State" means a State of the United States, the District of Columbia, Puerto Rico, Guam, the Virgin Islands, American Samoa, and the Northern Mariana Islands; and

(f) the term "submerged lands" means the lands--

(1) that are "lands beneath navigable waters," as defined in section 2 of the Submerged Lands Act (43 U.S.C. 1301);

(2) of Puerto Rico, as described in section 8 of the Act of March 2, 1917, as amended (48 U.S.C. 749);

(3) of Guam, the Virgin Islands and American Samoa, as described in section 1 of Public Law 93-435 (48 U.S.C. 1705); and

(4) of the Commonwealth of the Northern Mariana Islands, as described in section 801 of Public Law 94-241 (48 U.S.C. 1681).

§ 2103. Rights of access

(a) Access rights. In order to--

(1) clarify that State waters and shipwrecks offer recreational and educational opportunities to sport divers and other interested groups, as well as irreplaceable State resources for tourism, biological sanctuaries, and historical research; and

(2) provide that reasonable access by the public to such

abandoned shipwrecks be permitted by the State holding title to such shipwrecks pursuant to section 6 of this Act [43 U.S.C. § 2105], it is the declared policy of the Congress that States carry out their responsibilities under this Act [43 U.S.C. §§ 2101 et seq.] to develop appropriate and consistent policies so as to--

(A) protect natural resources and habitat areas;

(B) guarantee recreational exploration of shipwreck sites; and

(C) allow for appropriate public and private sector recovery of shipwrecks consistent with the protection of historical values and environmental integrity of the shipwrecks and the sites.

(b) Parks and protected areas. In managing the resources subject to the provisions of this Act, States are encouraged to create underwater parks or areas to provide additional protection for such resources. Funds available to States from grants from the Historic Preservation Fund shall be available, in accordance with the provisions of title I of the National Historic Preservation Act [16 U.S.C. §§ 470a et seq.], for the study, interpretation, protection, and preservation of historic shipwrecks and properties.

§ 2104. Preparation of guidelines

(a) In order to encourage the development of underwater parks and the administrative cooperation necessary for the comprehensive management of underwater resources related to historic shipwrecks, the Secretary of the Interior, acting through the Director of the National Park Service, shall within

nine months after the date of enactment of this Act [enacted April 28, 1988] prepare and publish guidelines in the Federal Register which shall seek to:

(1) maximize the enhancement of cultural resources;

(2) foster a partnership among sport divers, fishermen, archeologists, salvors, and other interests to manage shipwreck resources of the States and the United States;

(3) facilitate access and utilization by recreational interests;

(4) recognize the interests of individuals and groups engaged in shipwreck discovery and salvage.

(b) Such guidelines shall be developed after consultation with appropriate public and private sector interests (including the Secretary of Commerce, the Advisory Council on Historic Preservation, sport divers, State Historic Preservation Officers, professional dive operators, salvors, archeologists, historic preservationists, and fishermen).

(c) Such guidelines shall be available to assist States and the appropriate Federal agencies in developing legislation and regulations to carry out their responsibilities under this Act [43 U.S.C. §§ 2101 et seq.].

§ 2105. Rights of ownership

(a) United States title. The United States asserts title to any abandoned shipwreck that is--

(1) embedded in submerged lands of a State;

(2) embedded in coralline formations protected by a State on submerged lands of a State; or

(3) on submerged lands of a State and is included in or determined eligible for inclusion in the National Register.

(b) Public notice of location. The public shall be given adequate notice of the location of any shipwreck to which title is asserted under this section. The Secretary of the Interior, after consultation with the appropriate State Historic Preservation Officer, shall make a written determination that an abandoned shipwreck meets the criteria for eligibility for inclusion in the National Register of Historic Places under clause (a)(3).

(c) Transfer of title to States. The title of the United States to any abandoned shipwreck asserted under subsection (a) of this section is transferred to the State in or on whose submerged lands the shipwreck is located.

(d) Exception. Any abandoned shipwreck in or on the public lands of the United States is the property of the United States Government. Any abandoned shipwreck in or on any Indian lands is the property of the Indian tribe owning such lands.

(e) Reservation of rights. This section does not affect any right reserved by the United States or by any State (including any right reserved with respect to Indian lands) under--

(1) section 3, 5, or 6 of the Submerged Lands Act (43 U.S.C. 1311, 1313, and 1314); or

(2) section 19 or 20 of the Act of March 3, 1899 (33 U.S.C. 414 and 415).

§ 2106. Relationship to other laws

(a) Law of salvage and the law of finds. The law of salvage and the law of finds shall not apply to abandoned shipwrecks

to which section 6 of this Act [43 U.S.C. § 2105] applies.

(b) Laws of the United States. This Act shall not change the laws of the United States relating to shipwrecks, other than those to which this Act applies.

(c) Effective date. This Act shall not affect any legal proceeding brought prior to the date of enactment of this Act [April 28, 1988].

Supreme Court, U.S.
FILED
JUN 07 2000
CLERK

(2)

No. 99-1958

In The

Supreme Court of the United States

YUKON RECOVERY, L.L.C.,

Petitioner,

v.

OCEAN MAR, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE COMMONWEALTH OF VIRGINIA IN SUPPORT OF PETITIONER

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Mark Burwell, *Shipwrecks Off Alaska's Coast* (last modified Feb. 17, 2000) <http://www.mms.gov/alaska/ref/ships/tables/opqr.htm> 4

INTRODUCTORY STATEMENT

There are now two cases before this Court dealing with the standard of abandonment for shipwrecks. This case is one. The other is *Columbus-America Discovery Group, Inc. v. Atlantic Mut. Ins. Co.*, 203 F.3d 291 (4th Cir. 2000), *petition for cert. filed*, 68 U.S.L.W. 3757 (U.S. June 13, 2000) (No. 99-1935). A group of fifteen States and island jurisdictions* filed a brief *amici curiae* in *Columbus-America*, urging the Court to grant certiorari in *both* that case and in the case at bar. Brief *Amici Curiae* of Virginia, et al. at 19, *Columbus-America* (No. 99-1935) ("The *Columbus-America* case – especially in tandem with *Yukon Recovery* – presents this Court with an opportunity to address the issue and settle the matter. The petitions for writs of certiorari should be granted."). Not wishing to be unnecessarily duplicative, but wishing to ensure that the arguments of the *Amici* States are considered in connection with both cases, Virginia now re-submits the arguments previously made in the *Columbus-America* case.

A fundamental distinction between the two cases is that the S.S. *Islander*** – the subject of *Yukon Recovery* – sank in coastal waters, while the S.S. *Central America**** –

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* The *Amici* States in *Columbus-America* are Virginia, Alabama, Georgia, Illinois, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, North Carolina, the Northern Mariana Islands, Oregon, South Carolina, Washington and West Virginia.

** The S.S. *Islander* sank in the Gastineau Channel, an inland Alaskan waterway, in 1901 after striking an iceberg just minutes from the dock. It reportedly took with it to the bottom a large shipment of gold. Two rival salvage companies claim entitlement to the gold – one by contract right, the other by the law of salvage. Which salvor wins turns on whether the *Islander's* 1901 owners abandoned the gold.

*** The S.S. *Central America* foundered in the Atlantic 160 miles from shore during a hurricane in 1857, with the loss of

the subject of *Columbus America* – sank in the high seas. These two cases, if heard together, would present a unique opportunity for this Court to review and define the standard of abandonment for different legal landscapes. The Court would have the opportunity to determine whether shipwrecks in coastal waters are subject to the same standard of abandonment as shipwrecks in the high seas and, in any event, how the absence of contemporaneous salvage technology may figure into the analysis.

The brief that follows addresses these issues and is a repetition of the earlier brief filed in *Columbus-America*. Additional comments that may be helpful in relating the argument to *Yukon Recovery* are shown in bold italics. References to the *Amici* States refer to the same States and island jurisdictions that filed the previous brief.

INTERESTS OF *AMICI CURIAE*

The *Amici* are coastal States and island jurisdictions of the United States (collectively, "the *Amici* States").[1] As such, they exercise sovereignty over submerged lands lying adjacent to their shores.[2] Embedded in those submerged lands are the wrecks of thousands of ships, lost

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more than 400 lives and an immense quantity of gold. The locator of the *Central America* and the insurers of the *Central America's* cargo each claim ownership of the gold. The issue turns on whether the insurers abandoned the *Central America* after its sinking in 1857.

[1] One exception is West Virginia, which joins all of her sister States of the Fourth Circuit and which has analogous interests as a riparian State bordering the Ohio River.

[2] By virtue of the 1953 Submerged Lands Act, States bordering the Atlantic Ocean or Pacific Ocean may exercise sovereignty over lands lying beneath the ocean for a distance of three miles from their shores. States bordering the Gulf of Mexico may exercise like sovereignty into the Gulf for a distance of up to three marine leagues. Great Lake States may

over the centuries.[3] By act of Congress, shipwrecks "abandoned" by their original owners now belong to the coastal States and island jurisdictions ("the States") in whose submerged lands they lie embedded. Abandoned Shipwreck Act ("ASA"), 43 U.S.C. §§ 2101 *et seq.*[4] Some of the ships are believed to have been carrying gold or other precious cargo. Others may hold artifacts of important historical value.

Included among these shipwrecks are vessels as old as the *Tiger*, a British ship sunk along the Outer Banks of North Carolina in 1585,[5] and as tragic as the *Juno*, a 34-gun Spanish frigate that foundered in 1802 with the loss of 432 sailors, soldiers and civilians[6] and believed by some to have been carrying a large shipment of precious

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exercise such sovereignty to the boundary with Canada. 43 U.S.C. §§ 1301, 1312.

[3] Congress has estimated that 50,000 abandoned shipwrecks are located in State waters, with "5-10 percent" having historical significance. *See Abandoned Shipwreck Act of 1987*, H.R. Rep. Nos. 100-514(I) & 100-514(II), 100th Cong., 2d Sess. 1, (1988). *reprinted in* 1988 U.S.C.C.A.N. at 365, 370. *See also* Bruce D. Berman, Encyclopedia of American Shipwrecks, iii (1972) (referring to "more than 50,000 documented shipwrecks in American territorial waters," including approximately 13,000 with a gross tonnage of 50 tons or more).

[4] The *Amici* States likewise acquired title to abandoned shipwrecks embedded in their protected coralline formations, or lying on their submerged lands and included in (or eligible for inclusion in) the National Register of Historic Places. 43 U.S.C. § 2105.

[5] Bruce D. Berman, Encyclopedia of American Shipwrecks, 147 (1972).

[6] *Sea Hunt, Inc. v. The Unidentified Shipwrecked Vessel or Vessels*, 47 F. Supp. 2d 678, 681 (E.D. Va. 1999).

metals.[7] They include the *Queen Anne's Revenge*, flagship of the notorious pirate, Blackbeard, recently discovered in North Carolina waters;[8] the schooner *Billy Bowlegs*, a privateer lost in 1840 at the entrance to Apalachicola Bay, Florida and valued at the time at over $4 million;[9] the *Phoenix*, a three-masted, three-decked Russian frigate, the first ship built in Russian America, that sank in Alaskan waters in 1799 with the loss of the Archimandrite of the Kodiak Mission;[10] and the H.M.S. *Nancy*, a Detroit-built British warship burned and sunk by U.S. warships in Lake Huron during the War of 1812.[11]

For vessels such as these – and the thousands of other shipwrecks in coastal waters – State ownership means protection and responsible management. As the owners of shipwrecks, States are able to restrict recovery operations to those who are qualified and licensed. They are able to impose protocols that meet the exacting demands of serious underwater archeology.[12] And they

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[7] Maria Puente, *1802 Shipwreck In The Eye Of A Modern Legal Storm*, USA Today, May 7, 1998, at 9A.

[8] Faye Mitchell Henderson, *A Blackbeard Valentine's Tale* (last modified Feb. 12, 1999)<http://web.dcr.state.nc.us/recentblackbeard.htm>.

[9] Bruce D. Berman, Encyclopedia of American Shipwrecks, 109 (1972).

[10] Mark Burwell, *Shipwrecks Off Alaska's Coast* (last modified Feb. 17, 2000) <http://www.mms.gov/alaska/ref/ships/tables/opqr.htm>.

[11] David Swayze, *The Great Lakes Shipwreck File: Total Losses of Great Lakes Ships 1679-1998* (last modified Feb. 2000) <http://www.oakland.edu/boatnerd/swayze/shipwreck/>.

[12] *See, e.g.*, Va. Code § 28.2-1204 (1997); Va. Code § 10.1-2214 (1998) ("All recovery operations . . . shall be carried out . . . in such a manner that the maximum amount of historical, scientific, archaeological and educational information may be recovered and preserved in addition to the physical recovery of items.").

are in a position to ensure that the cultural riches – and other treasures – recovered from the sea are shared with the public.

In order to have these benefits, the States must have title. But, in order for States to obtain title under the ASA, the shipwreck must be abandoned. Yet, "abandonment" is not a term with a statutory definition and there is disagreement among the circuits about what must happen in order for abandonment to occur. As discussed below, one circuit appears to recognize only *express* abandonment. Another says that abandonment may be *implied*. Still another says that implied abandonment will suffice, but has raised the bar by adding the requirement that abandonment be proved by clear and convincing evidence. These widely varying standards cause unequal treatment among the *Amici* States, and deprive some of them of rights that Congress intended to bestow on all.

These two problems – unequal treatment of the States and frustration of Congressional purpose – should be enough to merit this Court's review of the abandonment issue. But there is more. Technological developments are making possible the location and recovery of shipwrecks once thought forever lost. It may not be long before our coastal waters teem with expeditions to recover the thousands of sunken vessels and cargoes that have accumulated over time. If chaos in admiralty is to be avoided, the ownership rights of the States must be clearly established. Given the conflict among the circuits, the issue cannot be settled until this Court speaks and declares a nationwide standard for what is meant by "abandonment."

There are now two cases available to this Court to clarify the standard for abandonment: ***Columbus-America and Yukon Recovery***. The *Amici* urge the Court to grant certiorari in both.

REASONS FOR GRANTING THE WRIT

Summary

The circuits are in conflict on what is required to establish abandonment of a shipwreck. Must abandonment be express, or may it be implied? Must the proof be clear and convincing, or does a preponderance of the evidence suffice? Admiralty law should give the same answers nationwide, but now it does not. Regional answers are especially troublesome when, as here, they create disparities among the rights of States. Certiorari should be granted to resolve this conflict.

Having the same answer nationwide does not necessarily mean using the same standard in coastal waters under the ASA, as in the high seas where the ASA does not apply. Whether there is to be one standard or two is an important federal question that should be, but has not been, addressed by the Court. In any event, the purposes and expectations of the ASA can only be met if the standard for coastal waters is implied abandonment, with a presumption of abandonment arising from passage of a long period of time.

Some courts have viewed the absence of technology to salvage a ship as an argument against abandonment. But it makes more sense to view such powerlessness as an argument *for* abandonment. Since many of the wrecks that are likely to be in dispute sank long before technology became available to recover them, the significance of technological incapacity is also an important federal question that should be addressed by this Court.

THE CIRCUIT CONFLICT IN A NUTSHELL

This Court has repeatedly recognized the importance and fundamental need for "harmony" and "uniformity" of admiralty law. *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986); *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372 (1918); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 160 (1920) (a "fundamental purpose" of the Constitution

is to "preserve adequate harmony and appropriate uniform rules relating to maritime matters . . . "); *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917); *The Lottawanna*, 88 U.S. 558 (1875). Despite the need for harmony and uniformity, the circuits are divided on whether the abandonment of shipwrecks must be express, or whether it may be implied. They also differ as to the standard of proof and the effect of a long passage of time. Their conflicting positions may be summarized as follows:

First Circuit: Presumption of abandonment based on passage of time – *Martha's Vineyard Scuba Headquarters, Inc. v. The Unidentified, Wrecked & Abandoned Steam Vessel*, 833 F.2d 1059 (1st Cir. 1987);[13] *see also Commonwealth v. Maritime Underwater Surveys, Inc.*, 403 Mass. 501, 531 N.E.2d 549 (1988).[14]

Second Circuit: Clear and convincing evidence of express abandonment – *Dluhos v. The Floating & Abandoned Vessel Known as the New York*, 162 F.3d 63 (2d Cir. 1998).[15]

Third Circuit: No reported circuit decision. District courts have used different standards: (i) presumption of

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[13] Law of finds (based on abandonment) appropriate where "(1) articles have been presumptively abandoned, *i.e.*, either affirmatively renounced, or so long lost that time can be presumed to have eroded any realistic claim of original title, and (2) those articles are now in hand, having been actually recovered . . . ." 833 F.2d at 1065. The *Republic* sank in 1909, seventy-six years before the First Circuit ruled.

[14] "We conclude that, since the *Whydah* has rested undisturbed and undiscovered beneath the sea for nearly three centuries, it is proper to consider the wreck abandoned and accordingly apply the law of finds." 531 N.E.2d at 552.

[15] Concerning a claim for ownership of a ship in the Erie Canal, and commenting on the preference for the law of salvage over the law of finds, the Second Circuit stated "the *New York* has neither been expressly and explicitly abandoned by its owners, nor has it rested for centuries under fathoms of open ocean." 162 F.3d at 74 [footnote omitted].

abandonment based on passage of time – *Sub-Sal, Inc. v. The DeBraak*, No. 84-296-CMW, 1992 U.S. Dist. LEXIS 2461 (D. Del. Feb. 4, 1992), *aff'd without op.*, 26 F.3d 123 (3d Cir. 1994);[16] (ii) consideration of all the circumstances – *Moyer v. The Wrecked and Abandoned Vessel, Known as The Andrea Doria*, 836 F. Supp. 1099 (D.N.J. 1993).[17]

Fourth Circuit: Clear and convincing evidence of express abandonment – *Columbus-America Discovery Group, Inc. v. Atlantic Mut. Ins. Co.*, 974 F.2d 450 (4th Cir. 1992), *cert. denied*, 507 U.S. 1000 (1993), *subsequent appeal, remanded on other grounds*, 203 F.3d 291 (4th Cir. 2000).[18] This is the most stringent standard used by any circuit. As a result, all five states comprising the Fourth Circuit

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[16] *Sub-Sal* was decided prior to enactment of the ASA, and concerned a British warship. "Since the *DeBraak* was abandoned in 1798 and its location off the coast of Delaware remained unknown until 1984, this Court concludes that the law of finds applies." 1992 U.S. Dist. LEXIS 2461, at *8.

[17] *Moyer* found an implied renunciation of ownership in the face of numerous independent, open and notorious salvage operations. "Abandonment may be inferred from circumstantial evidence. Factors such as lapse of time and nonuse by the owner may give rise to an inference of an intent to abandon." 836 F. Supp. at 1105 (citing *Wiggins v. 1100 Tons, More or Less, of Italian Marble*, 186 F. Supp. 452, 456 (E.D. Va. 1960). "Other factors include the place of the shipwreck as well as the actions and conduct of the parties having ownership rights in the vessel." 836 F. Supp. at 1105 (citing *Columbus-America Discovery Group, Inc. v. The Unidentified, Wrecked & Abandoned Sailing Vessel*, 742 F. Supp. 1327, 1335 (E.D. Va. 1990), *rev'd in part and remanded*, 974 F.2d 450 (4th Cir. 1992), *cert. denied*, 507 U.S. 1000 (1993)).

[18] "[A]bandonment must be proved by clear and convincing evidence . . . such as an owner's express declaration abandoning title." 974 F.2d at 466. *But see Baltimore, Crisfield & Onancock Line v. United States*, 140 F.2d 230 (4th Cir. 1944) and *Somerset Seafood Co. v. United States*, 193 F.2d 631 (4th Cir. 1951), where the Fourth Circuit used an implied abandonment standard.

join*ed* in support of the petition for certiorari *filed in Columbus-America*.

Fifth Circuit: Presumption of abandonment based on passage of time, implied abandonment – *Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330 (5th Cir. 1978).[19]

Sixth Circuit: Clear and convincing evidence and implied abandonment – *Fairport Int'l Exploration, Inc. v. The Shipwrecked Vessel Known as the Captain Lawrence*, 177 F.3d 491 (6th Cir. 1999).[20]

Ninth Circuit: Implied abandonment, but a demanding evidentiary standard (insurer's failure to react to earlier salvage efforts and failure to participate in claims proceedings are insufficient to imply abandonment) – *Yukon Recovery, L.L.C. v. Certain Abandoned Property*, 205 F.3d 1189 (9th Cir. 2000);[21] consideration of all the circumstances, with implied abandonment from passage of time or failure to salvage – *Deep Sea Research, Inc. v. The Brother Jonathan*, 89 F.3d 680 (9th Cir. 1996), *aff'd in part and*

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[19] "Disposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence stretches a fiction to absurd lengths." 569 F.2d at 337.

[20] "We agree that lapse of time, alone, does not necessarily establish abandonment, . . . and an owner's failure to return to a shipwreck site does not necessarily prove abandonment, but we recognize that a combination of several facts, proved clearly and convincingly, . . . may support a finding that an owner has abandoned a shipwreck." 177 F.3d at 499-500.

[21] Apparently the District Court in *Yukon Recovery* used the preponderance of the evidence standard, which the Ninth Circuit refused to address. 205 F.3d at 1193-94. The Ninth Circuit also agreed that the competing salvor was entitled to salvage the wreck based in part on its salvage contract with the gold insurer. *Id.* at 1197. Alaska's participation in this ***amicus effort*** is precluded by the terms of its settlement in *Yukon Recovery*. Issues between the other parties remain.

vacated in part on other grounds and remanded sub nom., California v. Deep Sea Research, Inc., 523 U.S. 491 (1998).[22]

Eleventh Circuit: Presumption of abandonment based on passage of time, implied abandonment – *Klein v. The Unidentified Wrecked & Abandoned Sailing Vessel*, 758 F.2d 1511 (11th Cir. 1985).[23]

As the above list shows, the circuit courts use different tests, even as they have acknowledged frustration at the lack of uniformity.[24] This divergence is particularly

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[22] "Although the district court in this case cites the Fourth Circuit's decision in *Columbus-America*, its holding that the *Brother Jonathan* is not abandoned rests on the traditional rule that a wreck is not abandoned unless either 1) title is affirmatively renounced, or 2) abandonment can be inferred from the lapse of time or failure to pursue salvage efforts on the part of the owners." 89 F.3d at 688.

[23] The Eleventh Circuit adopted the reasoning of the Fifth Circuit in *Treasure Salvors, Inc.*, 569 F.2d 330. *See supra* at n.19.

[24] As the Fourth Circuit noted, "[W]e agree that the [Fourth Circuit's] abandonment test was rejected by two other courts of appeal. . . . A comparison of our earlier decision in this case . . . with the decision of the Supreme Court and the Ninth Circuit in *Brother Jonathan* and the Sixth Circuit in *Fairport* indicates that the rule for finding abandonment is more stringent in [the Fourth Circuit] than in the Sixth Circuit and may be the same as the Ninth Circuit's rule in *Brother Jonathan*. In any event, the rule in the three circuits is not the same and the Supreme Court has not clarified the question. . . . " *Columbus-America Discovery Group, Inc. v. Atlantic Mut. Ins. Co.*, 203 F.3d 291, 303-04 (4th Cir. 2000). *See also Fairport Int'l Exploration, Inc. v. The Shipwrecked Vessel Known as the Captain Lawrence*, 105 F.3d 1078, 1084-85 (6th Cir. 1997); *Deep Sea Research, Inc. v. The Brother Jonathan*, 89 F.3d 680, 688 (9th Cir. 1996).

As the Ninth Circuit observed, "The ASA creates uncertainty when a salvor cannot determine in advance whether a wreck is 'abandoned' or 'embedded' and therefore subject to the ASA and questions of fact to be decided by the court. A salvor could expend immense resources to locate,

disturbing since the rights of sovereign States are directly implicated by the standard used. It is a divergence that can only be corrected by this Court's exercise of its constitutional role to maintain uniform admiralty laws. *Fitzgerald v. United States Lines*, 374 U.S. 16 (1963); *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411, 415 (1959). The petitions should be granted.

AN IMPORTANT FEDERAL QUESTION:

ARE SHIPWRECKS IN COASTAL WATERS UNDER THE SAME ABANDONMENT STANDARD AS SHIPWRECKS IN THE HIGH SEAS?

An unresolved issue in admiralty law is whether all shipwrecks are subject to the same standard of abandonment regardless of where they are found. Are shipwrecks beneath coastal waters – where the ASA applies – subject to the same standard as shipwrecks beneath the high seas?[25] The two shipwreck cases on which certiorari is now being sought – *Columbus-America* and *Yukon Recovery* – provide this Court with an opportunity to resolve this important issue of federal law.

The possibility that different standards might apply to different locations is implicit in the rationale used by the Fourth Circuit in deciding *Columbus-America*. The shipwreck in this case was found 160 miles from shore, well beyond the reach of the ASA. In determining what

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survey and salvage a wreck only to have the court later rule that the salvor is entitled to nothing because the ASA displaces the law of salvage. Both of the parties to this litigation have expended significant resources to locate the *Islander* but prudently avoided costly salvage operations which could have resulted in a total loss under the ASA." *Yukon Recovery*, 205 F.3d at 1196.

[25] For purposes of this Brief, the term "high seas" shall mean waters and submerged lands sufficiently distant from the shore as not to be covered by the ASA.

law to apply to the case, the Fourth Circuit was faced with two options – finds law and salvage law – with the choice between them depending on whether or not the vessel was abandoned. If the vessel *was* abandoned, then no one had title to it and the law of finds applied. If it was *not* abandoned, title remained with the original owner and the law of salvage applied. Before deciding what abandonment standard to use, the Fourth Circuit expressed a policy of favoring salvage law over finds law. The Court said:

> In sharp contrast to "the harsh, primitive, and inflexible nature of the laws of finds" is the law of salvage. *Admiralty favors the law of salvage over the law of finds because salvage law's aims, assumptions, and rules are more consonant with the needs of marine activity and because salvage law encourages less competitive and secretive forms of conduct than finds law.*

Columbus-America, 974 F.2d at 460 (emphasis added).

The Fourth Circuit then set the abandonment standard high in order to give a broad sweep to the favored law of salvage and a narrow sweep to the disfavored law of finds.

The *Columbus-America* Rationale Makes No Sense In Coastal Waters.

A major problem with the rationale used in *Columbus-America* is that it makes no sense to apply it to shipwrecks in coastal waters governed by the ASA. There the choice of law is different. In coastal waters, there is no law of finds. Instead, there is the law of salvage and the law of State ownership, with the choice between them again depending on whether or not the vessel was abandoned. If the vessel was *not* abandoned, title to it remains with the original owner and the law of salvage applies. If it *was* abandoned, title is vested in the State under the ASA. Since title must be vested in either the original owner or the State, the precondition on which the law of

finds is based – *i.e.*, that no one has title – never arises. *Dluhos*, 162 F.3d at 74, n.10; *Wiggins*, 186 F. Supp. at 456. *See also* 43 U.S.C. § 2106 ("The law of salvage and the law of finds shall not apply to abandoned shipwrecks to which § 6 of [the ASA] [43 U.S.C. § 2105] applies.").[26] Thus, in coastal waters, the rationale that animated the Fourth Circuit – a preference for the law of salvage over the law of finds – is irrelevant. "Where the reason of the rule ceases, the rule also ceases." *Funk v. United States*, 290 U.S. 371, 385 (1933); *United States v. Chambers*, 291 U.S. 217, 226 (1934). ***Thus the express abandonment standard created by the Fourth Circuit makes no sense when applied to wrecks such as the Islander.***

Whether There Is One Standard Or Two, Implied Abandonment Should Be The Rule For Shipwrecks In Coastal Waters.

If the policy-driven methodology used in *Columbus-America* is transported from the high seas into coastal waters, the different choice of law leads to an abandonment standard directly opposite to the one reached by the

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[26] There is one hypothetical exception to the proposition that the law of finds has no application in areas governed by the ASA. Under that statute, in order for a State to become the owner, the shipwreck must be both "abandoned" and "embedded" in the State's submerged lands. Theoretically, a shipwreck could be abandoned but not yet embedded. In such a case, the law of finds would apply to the abandoned wreck until it became embedded. As a practical matter, however, it is not likely that any ship of any value would be so readily abandoned, especially since "embeddedness" is a criterion that is met soon after the ship sinks to the bottom. "For purposes of this Act . . . the term 'embedded' means firmly affixed in the submerged lands or in corralline formations such that the use of tools of excavation is required in order to move the bottom sediments to gain access to the shipwreck, its cargo, *and any part thereof*." 43 U.S.C. § 2102 (emphasis added).

Fourth Circuit.[27] If finds law is disfavored compared to salvage law, then salvage law must likewise be disfavored compared to State ownership under the ASA. This preference for State ownership must be recognized for at least three reasons: First, to paraphrase *Columbus-America*, State ownership's "aims, assumptions and rules are more consonant with the needs of marine activity [than salvage law] and . . . [State ownership] encourages less competitive and secretive forms of conduct than [salvage law]." *See* 974 F.2d at 460. Second, State ownership is the result of congressional deliberation and enactment of the ASA, and thus represents a conscious policy choice made by the legislative branch. If Congress thought that salvage law was good enough for coastal waters, it would have said so. Third, State ownership is better designed than the law of salvage to protect the public interest in the historic value – and potential financial value – of shipwrecks in coastal waters.

In *Columbus-America*, the Fourth Circuit set the abandonment standard high in order to give broad sweep to salvage law, which it favored in the high seas context of that case. By analogy, then, when the shipwreck is in coastal waters, the abandonment standard must be set low in order to give broad sweep to State ownership, which is the favored law in that context. This means using a standard of implied abandonment for shipwrecks in coastal waters.

Since the policy-driven methodology used in *Columbus-America* logically leads to different standards in

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[27] This is not to say, however, that the Fourth Circuit will necessarily agree with this argument. Indeed, at least one district court in the Fourth Circuit views *Columbus-America* as requiring an express abandonment standard even for shipwrecks in coastal waters. *Sea Hunt, Inc. v. The Unidentified Shipwrecked Vessel or Vessels*, 47 F. Supp. 2d 678 (E.D. Va. 1999) (applying express abandonment standard to Spanish ships sunk in 1750 and 1802), *appeal docketed*, No. 99-2036 (4th Cir. July 30, 1999).

different contexts, the next question is whether that lack of uniformity is appropriate. And, assuming *arguendo* that there should be a single standard for both contexts, how should that standard be determined? One approach would be to continue the focus on policy considerations, but to ask which context – high seas or coastal waters – should drive the definition of that single standard. Is it more important to have (i) a broad application of State ownership in coastal waters, or (ii) a broad application of salvage law in high seas?

The *Amici* States contend that a broad application of State ownership is more important. This is so for at least three reasons. First, shipwrecks are more concentrated in coastal waters and are more likely to be recovered than shipwrecks in the high seas. Thus, the rule best suited for coastal waters should govern. Second, the public interest in shipwrecks located in coastal waters should outweigh the purely private interests of parties battling over shipwrecks in the high seas. Third, the legislative history of the ASA, on which State ownership is based, shows that Congress understood the rule to be abandonment by implication.

> [T]he term abandoned does not require the original owner to actively disclaim title or ownership. *The abandonment or relinquishment of ownership may be implied or otherwise inferred,* as by an owner never asserting any control over or otherwise indicating his claim of possession of the shipwreck.

H.R. Rep. No. 100-514(I), 100th Cong., 2d Sess. 1, (1988) at 2, *reprinted in* 1988 U.S.C.C.A.N. at 366 (emphasis added). The standard should be designed to accomplish – rather than frustrate – these Congressional expectations and give broad sweep to its enactment. Again, this means abandonment by implication.

Another approach to defining a single standard would be to disregard the competing policy considerations and to look to other principles instead. But to

disregard those policy considerations is to remove the very foundation on which the Fourth Circuit built its stringent standard in *Columbus-America*. What is left is the competing rationale used by Judge Widener in his *Columbus-America* dissent – and by courts in conflict with the Fourth Circuit – in recognizing a more generous abandonment standard. That standard includes recognition of abandonment implied by the long passage of time. "[D]isposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence stretches a fiction to absurd lengths." *Columbus-America*, 974 F.2d 450, 477 (Widener, J., dissenting), *quoting Treasure Salvors, Inc.*, 569 F.2d at 337 (Spanish galleon sunk in 1622); *also citing Martha's Vineyard*, 833 F.2d at 1065 (ocean liner sunk in 1909); *Klein*, 758 F.2d at 1514 (English ship sunk in eighteenth century).

In short, if there is to be a *single* standard for the high seas and coastal waters, then it must be implied abandonment, not express abandonment. On the other hand, if there are to be *separate* standards for coastal waters and the high seas, then the standard for coastal waters still must be implied abandonment. The *Amici* States urge the Court to grant certiorari in *Columbus-America* and *Yukon Recovery* in order to make it clear that whether there is to be one standard or two, the only standard applying to coastal waters is implied abandonment. ***The petitions should be granted to remove any doubt as to the standard of abandonment for coastal waters such as where the Islander rests.***

ANOTHER IMPORTANT FEDERAL QUESTION:

DOES THE ABSENCE OF SALVAGE TECHNOLOGY ARGUE *AGAINST* ABANDONMENT, OR *FOR* IT?

The decisions in *Columbus-America* and *Yukon Recovery* are based in part on the view that technological inability to find or salvage a shipwreck argues *against*

abandonment. *Columbus-America*, 974 F.2d at 463 (insurance carrier "not required to engage in efforts to recover the wreck in order to avoid abandoning its interest when such efforts would have had minimal chances for success") (citation omitted); *Yukon Recovery*, 205 F.3d at 1194 (failure to use "primitive, although ingenious, technology" that previously proved unsuccessful does not constitute abandonment). But, this has gotten things backwards, at least insofar as older shipwrecks are concerned. If the generation in which a vessel sank had no means to find or salvage it, a court should infer, in the absence of other evidence, that the owners of that vessel, having no hope of remedying their loss, simply abandoned it.[28]

The *Columbus-America* decision implicitly attributes to generations past a faith in technological progress that is a phenomenon of the late 20th century. ***The Yukon Recovery decision makes the same error.*** When confronted by a problem that current technology cannot solve, society today tends to believe it is only a matter of time before a solution will be found. It is an attitude that springs from witnessing the marvels of space travel, heart transplants, nuclear energy, computers, the Internet and all the other increases in technology over the past one or two generations. But for most of human history, the pace of progress has been very slow. The wooden ships that sailed the ocean two hundred years ago still had no means of power other than the wind, no means to light their craft other than oil lamps, and had been equipped only recently with a reliable means of finding their

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[28] *See generally, Eads v. Brazelton*, 22 Ark. 499 (1861) (rejecting claim by attempted salvor whose inability to recover shipment of lead was the result of the lack of steam power and other technology used by later, successful salvor).

longitude at sea.[29] By the time the *Central America* sank in 1857, steam power had been introduced as a supplemental source of power, often linked to paddlewheels. But ships were still made of wood and they were all designed to float on top of the sea, not sail beneath it. Electric power was still a generation or more away. Plumbing the bottom of the ocean was no more possible for man than flying to the moon. ***In the same vein, it took thirty-three years for someone to develop "primitive, although ingenious" technology to reach the Islander. Yet despite the innovative salvage attempt in 1934, which failed to recover the gold, neither the 1934 salvor nor the gold's insurer tried again.***

Nearly a century and a half later, those who found the wreck of the *Central America* and recovered her cargo were able to do so only by the use of science that not even Jules Vernes predicted: computer-guided, satellite-based, geo-positioning technology and robotic submarines, outfitted with video cameras, that could withstand the crushing pressures and extreme cold a mile and a half below the surface. To suggest that the owners of long lost shipwrecks not only foresaw the ability to recover them – but based their decisions on such prophecies – is fantasy. If the technology of the era did not permit recovery of a sunken vessel, the owners did not decide to wait a century or two until all these things could be invented. They did what any reasonable person of the era would have done: they abandoned it.[30] ***Similarly, those who seek to***

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[29] The means to accurately calculate one's longitude did not become available until the 1780's. *See* Dava Sobel and William J.H. Andrewes, The Illustrated Longitude (1998).

[30] "They [the insurance companies] had no hope or idea they could locate the *Central America*, and even if they located it, they had no hope they could recover anything from it. . . . Such action was guided by the decision that location of the wreck was next to impossible; but, even if located, recovering it was

recover the Islander's gold must rely on technology undreamed of one hundred years ago. The inability to salvage the Islander's gold until now tends to prove abandonment, particularly when the purported owner acquiesced in previous salvage attempts. Tellingly, although modern technology has found the Islander, neither party in Yukon Recovery has attempted salvage because of the legal uncertainties caused by the lack of a uniform test for abandonment. See supra at n.24. This Court should grant the petitions for the additional purpose of making clear that the absence of contemporaneous technology to recover an older wreck tends to *prove* abandonment, not disprove it.

CONCLUSION

A conflict among the circuits on an important legal issue can always be problematic, but it is especially troublesome when it occurs in admiralty law, where uniformity has always been greatly valued. It is even more urgent when the conflict causes some States of the Union to be denied important benefits that other States are granted. Such a troublesome and urgent conflict has arisen on the issue of abandonment. It should be resolved as soon as possible, and resolved in a manner that gives all States the full benefit of the implied abandonment standard contemplated by Congress when it passed the

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beyond the ability of any known means. Not only was this true in 1857, and five years thereafter, but continued to be true for some one hundred years thereafter. But even after scientific means of locating ship wrecks and possible recovery in deep water became known some twenty or more years prior to the actions of the plaintiff in this case, still not one of the insurance companies undertook to locate or recover the *Central America.*" *Columbus-America Discovery Group, Inc. v. The Unidentified, Wrecked & Abandoned Sailing Vessel*, 742 F. Supp. 1327, 1345 (E.D. Va. 1990).

Abandoned Shipwreck Act. The *Columbus-America* case – especially in tandem with *Yukon Recovery* – presents this Court with an opportunity to address the issue and settle the matter. The petitions for writs of certiorari should be granted.

July 7, 2000

Respectfully submitted,

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Supreme Court, U.S.
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CLERK

No. 99-1958

In The

Supreme Court of the United States

YUKON RECOVERY, L.L.C.,

Petitioner,

v.

OCEAN MAR, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Yukon Recovery's Petition does not involve a federal question, Constitutional provision or treaty. Should this case be accepted for review, this Court will be asked, in the absence of the State formerly involved (Alaska) which was dismissed before trial, to render an advisory opinion concerning the Abandoned Shipwreck Act (ASA), 43 U.S.C. §§ 2101-2106 (1994).

LIST OF PARTIES BELOW

The parties to this case below were Petitioner Yukon Recovery, L.L.C. and Respondent Ocean Mar, Inc.[1]

In the District Court, this matter was a consolidated action. The *in rem* defendants have never appeared or been represented in the courts below.

RULE 29.6 LIST

Ocean Mar, Inc. has no parent companies or subsidiaries.

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[1] In the U.S. District Court for the District of Alaska, Yukon Recovery L.L.C. filed an action entitled "Yukon Recovery, L.L.C., Plaintiff, v. Certain Abandoned Property, *in rem*, Defendant." Appendix to Petition (App. to Pet.) 15a. Ocean Mar, Inc. filed an action of its own. *Id.* The two actions were consolidated and tried together, and the trial judge issued one unified decision. *Id.* In the U.S. Court of Appeals for the Ninth Circuit, the appeal was styled "Yukon Recovery, L.L.C., Plaintiff-Appellant, v. Certain Abandoned Property, *in rem*, Defendant, Ocean Mar, Inc., Claimant-Appellee." 205 F.3d 1189.

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OPINIONS BELOW

The unanimous opinion and judgment of the U.S. Court of Appeals for the Ninth Circuit filed March 7, 2000, *Yukon Recovery, L.L.C. v. Certain Abandoned Property, in rem, Ocean Mar, Inc., Claimant-Appellee,* No. 98-36015 (9th Cir. 2000), is reported at 205 F.3d 1189. Petitioner reprinted it at App. to Pet. 1a.

The judgment and order of the U.S. District Court for the District of Alaska, Chief Judge Holland, presiding, filed August 28, 1998, is reported at 1998 A.M.C. ["American Maritime Cases"] 2884 (D. Alaska 1998) and 1998 WL 965985 (D. Alaska). It also is reprinted at App. to Pet. 15a.

STATEMENT OF JURISDICTION

Petitioner seeks review from the opinion and final judgment of the U.S. Court of Appeals for the Ninth Circuit filed March 7, 2000. No petition for rehearing was filed in the Court of Appeals. This Court has jurisdiction to review cases from the Courts of Appeals under 28 U.S.C. § 1254(1), and has admiralty and maritime jurisdiction pursuant to U.S. Const. art. III, § 2, cl. 1.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Respondent believes, as will be seen *infra,* that no constitutional provision or statute is involved in this case.

STATEMENT OF CASE

This marine salvage case concerns ownership interests in the cargo of the passenger steamer SS ISLANDER, which sank in the waters of the Territory of Alaska in 1901. At the time it sank the SS ISLANDER was carrying a cargo of gold belonging to the Canadian Bank of Commerce, being shipped via registered mail. The shipment was insured, and after the sinking the cargo insurer paid a large loss.

After many years of research and investigation, Ocean Mar, Inc., a marine salvage company, mounted a costly expedition in Southeast Alaska. By the use of highly sophisticated modern technology, Ocean Mar was able to locate the remaining parts of the vessel, and her valuable cargo. However, just as Ocean Mar was about to begin recovery of the cargo, further salvage efforts were enjoined by order of the United States District Court for the District of Alaska. A lawsuit had been filed by Petitioner Yukon Recovery L.L.C., seeking title to the cargo of the ISLANDER. Yukon Recovery had only been incorporated by one of its principals, the convicted felon Robert Mester, less than two months before the suit was filed. Yukon Recovery had been surreptitiously provided by a third party with certain confidential business records and research materials belonging to Ocean Mar, which gave the location of the sinking of the ISLANDER. Based upon these wrongly-procured trade secrets of Ocean Mar, Mester incorporated Yukon Recovery and its attorneys raced to court before Ocean Mar was able to bring to the surface any of the gold cargo which it had been the first to locate.

The case was tried before Chief Judge Holland in Anchorage, Alaska, beginning on July 13, 1997. Ocean Mar proved to the satisfaction of the Court how gold from the Yukon Territory was shipped to the coast at Skagway and from there by sea to Seattle or Vancouver. Ocean Mar demonstrated that the Canadian Bank of Commerce owned a large percentage of the gold that was shipped, and how it insured its shipments, which were usually carried as registered mail. Ocean Mar further proved that in all likelihood the insurer was The Marine Insurance Company Ltd. of London, England. The world-wide claims manager of The Marine Insurance Company testified at trial about that company's extensive involvement in insuring registered mail shipments of gold, coins and other high-value cargoes in the late nineteenth and early twentieth centuries. The documentary evidence and testimony at trial convinced the court that The Marine Insurance Company is the subrogated owner of the gold cargo on board the ISLANDER, and that it has not given up those rights. In opposition to the evidence submitted by Ocean Mar, Yukon Recovery was able to produce nothing more than the testimony of a supposed expert, who stated that he did not believe Ocean Mar's evidence.

The decision of the District Court granted Ocean Mar sole rights to salvage the cargo of the ISLANDER, and found The Marine Insurance Company was the subrogated owner of the gold belonging to the Canadian Bank of Commerce. The court further found that Ocean Mar was the first party in modern times to locate the wreckage of the ISLANDER, and accordingly was the "first finder" thereof. The court enjoined Yukon Recovery from any further involvement with the cargo of the

ISLANDER, and dismissed Yukon Recovery's lawsuit with prejudice.

A unanimous panel of the Ninth Circuit Court of Appeals affirmed the trial court's decision. Having submitted no contrary evidence at trial to dispute Ocean Mar's evidence, Yukon Recovery on appeal was forced to argue that the trial court had applied the wrong evidentiary standard. However, since both parties had agreed before trial that the preponderance of the evidence standard should apply, the Court of Appeals rejected Yukon Recovery's position, and affirmed the trial court. The Court of Appeals likewise affirmed the finding that Ocean Mar was the first finder of the cargo, and as such on that basis also was entitled to exclusive salvage rights.

Yukon Recovery has asserted herein that there is confusion in the lower courts concerning when, under the ASA, property is deemed "abandoned". This Court faced that exact issue in *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998). In that case, Justice O'Connor, in an opinion to which there was no dissent, wrote that "[T]he meaning of 'abandoned' under the ASA conforms with its meaning under admiralty law." *Id.*, at 508. As recently as two years ago, this Court believed that the term "abandoned" has a known and established meaning under admiralty law. Yukon Recovery has suggested nothing in its Petition to indicate that since that time, the lower courts have introduced any substantial confusion concerning the meaning of that term.[2] Indeed the majority of

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[2] Since treasure salvage cases can involve either modern vessels lost for only a few years, or ancient wrecks hundreds or

the decisions relied upon by Yukon Recovery pre-date this Court's indication in *Deep Sea Research* that the meaning of "abandoned" is clear.

REASONS FOR DENYING THE WRIT

Yukon Recovery asserts that "[T]his Petition involves construction of the Abandoned Shipwreck Act (ASA) of 1987, 43 U.S.C. §§ 2101-2106. . . . "[3] Pet. 2. Yukon Recovery is simply wrong, and Ocean Mar feels compelled, pursuant to Rule 15.2, to advise the Court that the Petition is based upon a fundamental misstatement of fact.

The ASA provides that the United States takes title to an abandoned shipwreck meeting any one of three criteria. 43 U.S.C. § 2105(a). The ASA then immediately passes title from the United States to the State in or on whose submerged lands the shipwreck is located. *Id.*, § 2105(c). Therefore, in any case involving the ASA, an owner of a wrecked ship, a salvor, or a subrogated insurer litigates against the State concerned. *See, California v. Deep Sea Research, Inc.*, 883 F. Supp. 1343 (N.D. Cal. 1995), *aff'd*, 102

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even thousands of years old, such matters (and adjudications concerning them) are of necessity fact-specific. Yukon Recovery acknowledges this. Pet. 19. Overall, however, Justice O'Connor is correct that the meaning of "abandoned" is quite clear: abandonment occurs when title has been affirmatively renounced, or when the factual circumstances (such as the passage of thousands of years) give rise to a clear inference of abandonment (*i.e.*, there is no owner or subrogated insurer to assert a claim of title). *See Deep Sea Research*, 523 U.S. at 499.

[3] The ASA is reprinted in Petitioner's App. to Pet. 31a-36a.

F.3d 379 (9th Cir. 1996), *aff'd in part, vacated on other grounds, and remanded*, 523 U.S. 491 (1998).

In this case, Alaska was not involved in either the trial or the appeal, and had no interest in the outcome of either. On May 2, 1997, several months before the trial, and three years before the appeal was decided, Ocean Mar entered into a settlement agreement with Alaska, in whose waters the wreck of the ISLANDER lies. The agreement, Def. Exh. C5, is reprinted herein at Brief in Opposition Appendix (Opp. App.) 1a-4a. That agreement provides that, with the exception of small amounts of gold which might have been the personal property of passengers on board the vessel, the cargo of gold "[I]s the property of The Marine Insurance Company Ltd., and the State of Alaska claims no ownership or other interest therein." (*Id.* at 2a). Alaska agreed with Respondent that "[T]he ISLANDER carried commercial gold that was insured by The Marine Insurance Company Ltd. The Marine Insurance Company Ltd. paid claims made by the owners of the gold and is now the subrogated owner of the gold shipped aboard the vessel." (*Id.* at 1a).

Similarly, Yukon Recovery entered into its own contract with Alaska. That agreement, which was filed with the court in the form of a stipulation between Yukon Recovery and the State, is reprinted at Opp. App. 5a-12a. After entering into these separate agreements with Ocean Mar and Yukon Recovery, Alaska agreed that it could be dismissed from the litigation, and the trial court so ordered. Interestingly, elsewhere in the trial court and in its agreement with Alaska, Yukon Recovery took exactly the opposite position to that which it is espousing in its Petition. The stipulation restates the parties' positions:

Alaska had asserted that "[U]nder the [ASA], title to any abandoned shipwreck or cargo thereof that is embedded in submerged lands of a state is ceded to that state. . . . [but] Yukon Recovery disagrees with the State's assertions set forth above. . . . " Opp. App. 7a. In the trial court, Yukon Recovery repeatedly denied that the ASA applies, and so advised the District Court again in its stipulation with Alaska. *Id.* Yet Yukon Recovery would now have this Court believe that the ASA is central to a resolution of the dispute concerning the cargo of the ISLANDER, even though Alaska, which would otherwise receive title pursuant to 43 U.S.C. § 2105(c), gave up all of its rights to the cargo, Opp. App. 2a, and has not been a party to the two consolidated lawsuits since before the trial began.

Far from being an ASA case, this is actually an insurance subrogation case. The Court of Appeals referred to The Marine Insurance Company's subrogation rights in two places, 205 F.3d at 1193 and 1194. The District Court specifically referenced the Agreement between Alaska and Respondent; its decision enforces "[T]he rights of the State of Alaska under its contract with Ocean Mar, Inc. . . . " App. to Pet. 28a, to certain historical artifacts (only). While it is true that the Court of Appeals' decision on one page does mention the ASA (205 F.3d at 1196), such reference is solely in dictum, clearly not necessary to the reasoning of the decision. In that reference, the Court of Appeals explains why in general, salvors of wrecks located in state waters cannot with impunity, following the passage of the ASA, conduct freewheeling and expensive salvage operations: they risk losing to the state concerned all right and title to the property they recover.

Therefore they first proceed to court (as the parties did here) for a determination of the legal rights and ownership interests involved.

Because the ASA is neither central to, nor even involved in, the issues which were resolved by the courts below, Yukon Recovery's Petition asks this Court for an advisory opinion.[4] This Court does not render advisory opinions,[5] and therefore this matter is not properly reviewable on a writ of *certiorari*.

1. The Trial Court Resolved A Factual Dispute, And The Court Of Appeals Affirmed

Nowhere does the Petition show "compelling reasons"[6] to grant the writ. The Petition admits that the Ninth Circuit Court of Appeals' decision in this case "[E]ssentially places it in alignment with the Fourth Circuit's express abandonment standard. . . . " Pet. 17. This Court has often noted that it is very important that the Court not grant the writ of *certiorari* except "in cases where there is a real and embarrassing conflict of opinion

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[4] "Passing upon the possible significance of the manifold provisions of a broad statute in advance of efforts to apply the separate provisions is analogous to rendering an advisory opinion upon a statute or a declaratory judgment upon a hypothetical case." *Watson v. Buck*, 313 U.S. 387, 402 (1941).

[5] "We do not sit to decide hypothetical issues or to give advisory opinions about issues as to which there are not adverse parties before us. *See, e.g., Sierra Club v. Morton*, 405 U.S. 727, 731-732 (1972); *Flast v. Cohen*, 392 U.S. 83, 99 (1968)." *Princeton U. v. Schmid*, 455 U.S. 100, 102 (1982) (parallel citations omitted).

[6] Rule 10.

and authority between the Circuit Courts of Appeals." *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923). Since in this case the ASA is not involved, the Petition does not raise any question of law, whether unsettled, important or otherwise. Here, there is no case or controversy involving the ASA.[7]

The Petition argues only that this Court should grant a hearing to consider whether the Court of Appeals was correct in affirming the trial court's factual findings that (1) Ocean Mar is the legitimate contract salvor for the subrogated insurer of the cargo of the ISLANDER, and (2) Ocean Mar was the first finder of that cargo. The Petition does not and cannot contend that the review of those factual decisions would have any significance beyond this case.

"[T]his Court does not sit for the benefit of particular litigants. . . . " *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 73-74 (1932) (Frankfurter, J.) Nor is this Court "the place to review a conflict of evidence [or] to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other. . . . " *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 503 (1951). *See, e.g., United States v. ITT Continental Baking*

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[7] "Because the requirement of a continuing case or controversy derives from the Constitution, *Liner v. Jafco, Inc.*, 375 U.S. 301, 306, n. 3 (1964), it may not be ignored when inconvenient, *United States v. Alaska S.S. Co.*, 253 U.S. 113, 116 (1920) (moot question cannot be decided, '[h]owever convenient it might be'). . . . " *Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc.*, 120 S.Ct. 693, 721 (2000) (parallel citations omitted).

Co., 420 U.S. 223, 226-27 n.2 (1974); *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178-79 (1938), *aff'd on reh'g*, 305 U.S. 124 (1938); *FTC v. Am. Tobacco Co.*, 274 U.S. 543, 544 (1927) (The Court should "adhere to the usual rule of noninterference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations. . . . ") Accordingly, the Petition shows on its face that it should be denied.

Moreover: (1) the Court of Appeals was clearly correct on the insurance subrogation and contract salvor issue, based upon the evidence introduced at trial and the evidentiary standard which both parties agreed should be applied; and (2) the Court of Appeals had an independent basis for its ruling which the Petition does not discuss. We turn to these points next; each independently establishes that this Court should deny review.

A. The Courts Below Correctly Held, By The Proper Evidentiary Standard, That Ocean Mar Is The Contract Salvor For The Subrogated Insurer

The trial of this matter in the District Court involved oral and documentary proof by Ocean Mar that The Marine Insurance Company insured the cargo of commercial gold being carried on board the ISLANDER. While Yukon Recovery argued that Ocean Mar's proof was not adequate, the trial court found that it was. On appeal, Yukon Recovery argued that the trial court applied the wrong standard of proof. 205 F.3d at 1193. The Court of Appeals noted that Yukon Recovery's appeal was

addressed to the alleged error of the trial court in applying the preponderance of the evidence standard; significantly, the sufficiency of the evidence supporting the District Court's decision was not challenged on appeal. (*Id.* at 1194, 1195). It is clear from Yukon Recovery's statement in its Petition that Yukon Recovery really seeks a further appeal of the evidentiary findings of the trial court: "[T]he record is devoid of any documentary evidence that gold on board The SS ISLANDER was insured. . . . " Pet. 8. Such factual review is not the province of this Court.

Yukon Recovery states that if a writ of *certiorari* is granted, "[T]he Court will be invited to consider whether special evidentiary rules need to be in place for proof (by a marine insurer) of a subrogation interest in a wreck." Pet. 18. As the Court of Appeals noted, Yukon Recovery itself asked the trial court to apply the usual (preponderance of the evidence) standard, which the District Court then adopted. 205 F.3d at 1193-1194. Yukon Recovery was and is therefore precluded from raising that issue on appeal, either in the Ninth Circuit or before this Court.[8]

B. Yukon Recovery Ignores The Independent Basis For The Decision Below

The Ninth Circuit noted that the trial court found for Ocean Mar on at least two bases: (1) Ocean Mar, as a

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[8] As the Ninth Circuit noted, utilizing the standard which the District Court applied was not error, but if it had been, the error would have been invited. 205 F.3d at 1194.

contract salvor, has the right to recover the cargo of the ISLANDER on behalf of its principal, The Marine Insurance Company, the subrogated insurer, 205 F.3d at 1197; and (2) Ocean Mar was the first in modern times to find the wreck of the ISLANDER, to observe, record and make a timely claim to the wreckage of the ship and its cargo. *Id.* Even if this Court were to do what Yukon Recovery asks, namely to determine as a factual matter that the cargo of the ISLANDER was abandoned and The Marine Insurance Company is not the subrogated insurer thereof, Yukon Recovery cannot prevail. It has not sought review of the trial court's determination that Ocean Mar is the first finder of the cargo. Having abandoned the opportunity to do so,[9] the findings of fact of the District Court at App. to Pet. 22a-24a and the conclusions of law, *Id.*, 28a-29a, that Ocean Mar was the first finder remain fully viable.

If the cargo was abandoned, it all belongs now to Ocean Mar as the first finder, under the well-established law of finds. *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 336-7 (5th Cir. 1978), and further proceedings *sub nom. Florida Dept. of State v. Treasure Salvors, Inc.*, 621 F.2d 1340 (5th Cir. 1980), *aff'd in part and rev'd in part*, 458 U.S. 670 (1982). The agreement between Ocean Mar and Alaska memorializes the relinquishment by the State of all claims to the gold cargo. Opp. App. 2a. ("[T]he State of Alaska claims no ownership or other interest therein.") Yukon Recovery's

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[9] *See, e.g., Stevens v. Dept. of Treas.*, 500 U.S. 1, 8-10 (1991) (Court will not rule on merits of position which litigant has abandoned).

requested relief, Pet. 7 n.2, that the matter be sent back to the District Court, if granted, would be a meaningless act, since that court's finding that Ocean Mar was the first finder would remain intact; Ocean Mar would then still have title to and would be entitled to recover and possess all of the commercial gold cargo. App. to Pet. 28a-29a; 205 F.3d at 1197.

CONCLUSION

For the foregoing reasons, the Petition of Yukon Recovery should be DENIED.

Respectfully submitted,

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July 3, 2000

AGREEMENT

This Agreement is made the 2nd day of May, 1997, between Ocean Mar, Inc., of 325 S. Washington Avenue, Suite 1, Kent, Washington, 98032, and the State of Alaska.

WHEREAS:

1. The vessel "ISLANDER" owned by Canadian Pacific Navigation Company, Ltd., while on voyage from Skagway, Alaska to Victoria, British Columbia, sank on August 15, 1901 in Stephens Passage between Douglas Island and Admiralty Island near Juneau, Alaska.

2. At the time of the loss, the ISLANDER carried commercial gold that was insured by The Marine Insurance Company Ltd. The Marine Insurance Company Ltd. paid claims made by the owners of the gold and is now the subrogated owner of the gold shipped aboard the vessel.

3. Ocean Mar, Inc., has entered into a salvage agreement with The Marine Insurance Company Ltd. and The Salvage Association to recover The Marine Insurance Company Ltd.'s property.

4. In addition to commercial gold carried aboard the ISLANDER, additional private gold carried by passengers or crew may be found in or near the wreck.

5. The wreck of the ISLANDER is scattered in various debris fields in Stephens Passage. Parts of the ship's gear and appurtenances may remain in the debris fields. In addition, there may be in the debris field personal items from the passengers who were aboard the vessel at

the time of the sinking. The State of Alaska has an interest in such artifacts in that they are representative of a period in the Territory of Alaska's history.

NOW, THEREFORE, in consideration of the mutual promises contained herein, the parties agree as follows:

a. With respect to the commercial gold which was carried aboard the ISLANDER, said gold is the property of The Marine Insurance Company Ltd., and the State of Alaska claims no ownership or other interest therein. Ocean Mar, Inc. will proceed, with the approval of the United States District Court, to recover that gold;

b. Ocean Mar, Inc. will demonstrate to the State, to the best of its ability, which gold was carried as commercial gold. Ocean Mar, Inc. believes that the commercial gold carried aboard the ISLANDER will be found in the following forms:

i. Gold bars ranging in size from 100 to 1,800 ounces;

ii. Gold nuggets and gold dust shipped in leather pouches weighing 50 to 80 pounds;

iii. Gold coins shipped in similar leather pouches or in wooden boxes.

c. Any and all artifacts, as enumerated in the Stipulated attached as Exhibit A hereto, recovered by Ocean Mar, Inc, during its efforts to recover The Marine Insurance Company Ltd.'s property will be turned over to the State of Alaska and shall become the property of the State of Alaska. Ocean Mar, Inc. shall use reasonable efforts to recover such items, however it is understood that Ocean Mar, Inc. may decline to recover artifacts if safety and/or

cost considerations would render such efforts unreasonable. The final decision on recovery is solely Ocean Mar's. The procedure to be employed by Ocean Mar, Inc. in the recovery of these items is set forth in the Stipulation attached as Exhibit A hereto.

d. With respect to any personal gold that is recovered by Ocean Mar, Inc. that does not belong to The Marine Insurance Company Ltd., the State and Ocean Mar, Inc. agree that the State will receive 10% of the gold recovered, by weight, in whatever form it may be. Personal gold would include the form of small "pokes" of gold dust or nuggets that were carried either on the persons of passengers or in passenger luggage.

e. Ocean Mar, Inc. shall keep accurate and complete records for accounting purposes in respect to its recoveries in connection with this Agreement and such records shall be available for inspection by the State at any reasonable time.

f. In the event that a dispute arises over whether or not certain gold is the property of The Marine Insurance Company Ltd., the parties agree that the dispute shall be referred to an Arbitrator to be agreed upon between the parties, or failing agreement, to two Arbitrators, one to be chosen by each party in the dispute.

g. This Agreement shall be governed by the law of the State of Alaska.

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ATTORNEY GENERAL

/s/ John T. Baker

By: John T. Baker
Assistant Attorney General
Attorney for State of Alaska

KEESAL, YOUNG & LOGAN

/s/ John A. Treptow

By: John A. Treptow
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1N THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

YUKON RECOVERY, L.L.C., Plaintiff, vs. CERTAIN ABANDONED PROPERTY, *in rem*, Defendant.	) No. A96-0270-CV (HRH)) No. A96-0304-CV (HRH)) (Consolidated)

STIPULATION BETWEEN YUKON RECOVERY AND STATE OF ALASKA AND ORDER FOR DISMISSAL OF STATE OF ALASKA

This stipulation is entered into, subject to the approval of the Court, between Yukon Recovery, L.L.C. ("Yukon Recovery") and the State of Alaska ("State") in order to facilitate the dismissal of the State as a party to this action.

WHEREAS, Yukon Recovery and Ocean Mar, Inc. ("Ocean Mar") claim certain rights to recover property

believed to be associated with the remains of the S.S. ISLANDER, a vessel which sank near Juneau, Alaska, in 1901, or its cargo;

WHEREAS, property believed to be associated with the remains of the S.S. ISLANDER or its cargo is located on submerged lands owned by the State pursuant to the Submerged Lands Act of May 22, 1953, 67 Stat. 29, 43 U.S.C. § 1301 et seq.;

WHEREAS, Yukon Recovery and Ocean Mar have each brought claims in admiralty, now consolidated in this action, in this Court to determine the extent of their respective rights to recover said property;

WHEREAS, under AS 41.35, the Alaska Historic Preservation Act, the State is charged to preserve and protect the historic, prehistoric, and archaeological resources of Alaska from loss, desecration, and destruction so that the scientific, historic, and cultural heritage embodied in these resources may pass undiminished to future generations;

WHEREAS, under AS 41.35, the State reserves to itself title to, and the exclusive right to conduct field archeology on, all historic, prehistoric, and archaeological resources situated on land owned or controlled by the State, including tideland and submerged land;

WHEREAS, the State asserts that the property in dispute in this action is subject to AS 41.35, the terms of which are enforced by the State Historic Preservation Officer ("SHPO");

WHEREAS, the State asserts that under the Abandoned Shipwrecks Act, 43 U.S.C. §§ 2101-2106 ("ASA"),

title to any abandoned shipwreck or cargo thereof that is embedded in submerged lands of a state is ceded to that state;

WHEREAS, the State asserts that where the ASA applies and a state has an interest in the shipwreck in question, the maritime doctrines of salvage and finds are preempted as a means of determining title to the property and the 11th Amendment to the United States Constitution divests federal courts of subject matter jurisdiction over admiralty claims to the property; and,

WHEREAS, Yukon Recovery disagrees with the State's assertions set forth above;

WHEREAS, the parties to this Stipulation wish to avoid all unnecessary delay in resolving title to the property, and to avoid litigating the applicability of the ASA in this case while nevertheless taking all reasonable steps to protect the historic, prehistoric, and archaeological resources involved;

NOW THEREFORE, in consideration of the mutual terms and conditions stated herein, the parties stipulate and agree as follows:

1. Yukon Recovery agrees that if it succeeds in this action in obtaining a judgment declaring Yukon Recovery's rights to recover the property, Yukon Recovery shall retain an archeologist who meets the standards established by the Secretary of the Interior under 36 C.F.R. Part 61, Appendix A, and who meets the requirements of 11 AAC 16.010 - 090, to serve as the project archaeologist in the recovery of any items believed to be associated with the S.S. Islander or its cargo. The project archaeologist

will assist Yukon Recovery in documenting recovery efforts, inventorying items recovered, identifying collection and curation procedures for appropriate items, and making recommendations as necessary to minimize disturbance to the affected site(s).

2. Yukon Recovery shall:

a. provide the State on a weekly basis with a daily log of items recovered;

b. provide the State with a representative sample of items recovered under the procedures established in paragraph 3 of this Stipulation, including any gold recovered in bar, nugget or dust form, with a representative sample defined as "an example of any item recovered which is sufficient in quantity and quality to clearly illustrate the physical characteristics of the item";

c. provide the State with payment of a royalty in the amount of 7% of net income derived from any gold recovered in bar, nugget or dust form, to be paid during the year for which such income is declared by Yukon Recovery pursuant to 26 U.S.C. § 11, provided that the appraised value of any gold bar, nugget or dust delivered to the State may, at Yukon Recovery's election, be credited toward the royalty payment due the State during the year of delivery;

d. provide the State with documentation of recovery efforts, including but not limited to the methodology used, maps, photography and Global Positioning System ("G.P.S.") locations of the affected sites and associated debris fields, and an inventory of all items recovered and the location of their recovery, no later than 120

days after completion of the field salvage season in which items were recovered;

e. allow the State to inspect all items recovered prior to the removal of any item from the State; and,

f. consult with the State prior to producing any materials for public distribution.

3. Yukon Recovery shall:

a. consult directly with the Alaska State Museum in Juneau ("State Museum"), with guidance as necessary and final approval by the SHPO, to identify items appropriate for recovery and subsequent interpretation and display by the State Museum. Appropriate items may include, but are not limited to, the ship's wheel, compass, navigation and optical instruments, bell, vessel control devices, bottles, furnishings, fixtures, and personal belongings such as rings, watches, firearms, knives, buttons, smoking devices, coins and jewelry. Any such items identified and recovered shall be deemed the property of the State.

b. Yukon Recovery shall use reasonable efforts to recover non-gold items and artifacts described in a. of this paragraph, but only to the extent that recovery of such items is incidental to the primary gold recovery operation. Yukon Recovery shall not be obligated to recover such items if safety and/or economic considerations would make recovery unreasonable. Yukon Recovery shall take all reasonable steps to minimize damage to non-gold items and artifacts, including ship parts and personal belongings, during its recovery operations.

c. Yukon Recovery may have access to State-owned items recovered pursuant to this Stipulation for use in connection with public forums or presentations relating to the recovery operations of the S.S. ISLANDER, provided that Yukon Recovery meets such requirements as the Alaska State Museum may determine appropriate for such use. Any items made available to Yukon Recovery for such use shall remain the exclusive property of the State.

4. Yukon Recovery shall make its archival and ongoing research documentation available to the State upon reasonable notice, in order to provide historical context for the affected site(s), associated debris fields and any items recovered.

5. Yukon Recovery shall take all reasonable steps to meet the following deadlines:

a. A comprehensive inventory and State inspection of items recovered must be allowed no later than 30 days after the end of each field salvage season. At that inspection, the SHPO shall select a representative sample of items recovered, which shall be curated by the State Museum.

b. Items selected by the SHPO, along with necessary documentation, shall be delivered to the State Museum no later than 120 days after completion of the field salvage season in which the items were recovered.

6. In consideration of the terms agreed to herein, the State shall be dismissed as a party to this action, with each party to bear its own costs and fees resulting from the State's participation in this action, provided that the

Court shall have continuing jurisdiction to enforce the provisions of this Stipulation.

DATED this 2nd day of May, 1997 at Anchorage, Alaska.

BRUCE M. BOTELHO
ATTORNEY GENERAL

/s/ John T. Baker

By: John T. Baker
Assistant Attorney General
Attorney for State of Alaska

DATED this 2nd day of May, 1997 at Anchorage, Alaska.

RUBINI & REEVES
/s/ Susan E. Reeves for
By: Jonathan B. Rubini
Attorney for Yukon Recovery, L.L.C.

Supreme Court, U.S.
FILED
AUG 1 2000
CLERK

(4)

No. 99-1958

In The

Supreme Court of the United States

YUKON RECOVERY, L.L.C.,

Petitioner,

v.

OCEAN MAR, INC.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

1. This Petition involves the proper construction of the Abandoned Shipwreck Act (ASA), 43 U.S.C. §§ 2101-06, particularly the standard of abandonment under the Act and the relative burdens of proof to be assigned in such a case. Respondent challenges this characterization (Pet. Reply 5), and relies on the stipulations entered into by the State of Alaska with both of the contesting parties in the case. Ocean Mar suggests that because Alaska has apparently waived its rights to the cargo of the The SS ISLANDER, the ASA is not implicated here. Respondent's view is mistaken.

For starters, the Ninth Circuit expressly based its decision on the ASA and its standard of abandonment. See Pet. App. 7a-8a & n.3, 10a-12a. Moreover, Ocean Mar's stipulation with Alaska is premised on the factual assumption that the gold carried on board The ISLANDER "is the property of the Marine Insurance Company [MIC], Ltd." Pet. Reply App. 2a (¶ a). That assumption is precisely what is at issue in this case: MIC's continued claim by subrogation to cargo aboard The ISLANDER, despite the facts that MIC had no documentary evidence that it even insured the cargo and that MIC did not object to subsequent salvage efforts by unrelated parties. Lastly, as Respondent concedes (Pet. Reply 6), under Alaska's stipulation with Ocean Mar, Alaska continues to assert a claim to gold not ostensibly owned by MIC. See Pet. Reply App. 3a (¶ d). The proper construction of the ASA's standard of abandonment is fully joined here.

2. Respondent also argues that there is an independent basis for decision below, one that would render this Court's review of the case futile. This, too, is mistaken. The courts below certainly did not base Ocean Mar's rights on its putative

status as the first finder of The ISLANDER. Rather, both the District Court and Ninth Circuit hinged their decisions on a ruling that Ocean Mar had acquired a valid salvage claim from MIC. See App. 9a ("The premise of Yukon's first argument is untenable because the district court's finding regarding abandonment is undisturbed on appeal"); 27a ("The court concludes that the arrest of light fixture does not, in and of itself, afford Yukon Recovery any legal status which is entitled to preference or legal priority over a contract salvor of cargo such as Ocean Mar."); 28a ("The court concludes as a matter of law that a contract salvor should be preferred over one such as Yukon Recovery which has no rights as regards the wreckage site beyond those associated with the arrest of the light fixture.").

It was only because the lower courts ruled that Ocean Mar was a contract salvor for MIC's gold, that they were prepared also to extend Ocean Mar's rights as a finder to gold not under a subrogation claim by MIC. If this Court were to concur with Yukon's submission that MIC had abandoned any interest it had in gold on board The ISLANDER, it logically follows that Ocean Mar can take nothing from its salvage contract with MIC. Ocean Mar can simply have no rights as a contract salvor of The ISLANDER if MIC is no longer an owner of property on board the vessel. The lower courts' rulings that Ocean Mar is the salvor-in-possession of The ISLANDER, based on its status as a contract salvor, should thus be reversed or vacated. In this event, the Court might properly remand for further proceedings. The district court should be given the opportunity to review its decision that Ocean Mar was the exclusive salvor-in-possession of The ISLANDER.

3. Lastly, Respondent intimates that the issue presented here is not worthy of the Court's review. But in the time since this Petition has been filed, two new opinions have issued from

the Courts of Appeals that further sharpen the manifest divisions in lower court interpretations of the ASA and the general maritime law's standard of abandonment.

In *International Aircraft Recovery, L.L.C. v. Unidentified Wrecked and Abandoned Aircraft*, 2000 WL 977396 (11th Cir. July 17, 2000), the Eleventh Circuit apparently embraced the Fourth Circuit's extreme test of express abandonment for property lost at sea. See id. at *2 ("Admiralty law presumes that owners do not give up title to ships and cargo in marine peril . . . .") (citing *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 974 F.2d 450, 460 (4th Cir. 1992)).[1] As Petitioner earlier noted, Pet. 17, the Ninth Circuit's analysis in this case essentially replicated the express abandonment standard articulated by the Fourth Circuit, and now joined by the Eleventh.

More disturbingly, in *Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels*, 2000 WL 1015814 (4th Cir. July 21, 2000), the Fourth Circuit applied *Columbus-America*'s express abandonment standard in order to oust State title to a wreck situated in State waters and thus governed by the ASA. See id. at *3. And while the Fourth Circuit attempted in *Sea Hunt* to harmonize its express abandonment standard with the test employed by the First, Fifth and Sixth Circuits, see id. at *5, it appeared to acknowledge the manifest split in authority. The *Sea Hunt* opinion also relied upon the Ninth Circuit's *Yukon* decision in its analysis of whether subsequent improvements in salvage technology and whether the actual undertaking of salvage efforts were to be regarded as evidence of abandonment or not. See id. at *11. These issues are fully presented in this

[1] The later proceedings in *Columbus-America* are now before this Court in Petition Docket No. 99-1935.

Petition.

As Petitioner earlier predicted, Pet. 18-19, the split in the Circuits is growing – not narrowing – on these significant issues of the ASA's construction and the standard of abandonment under the general maritime law.

* *** *

For the foregoing reasons, and those previously articulated, the Petition should be GRANTED.

Respectfully submitted.

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